to obtain a hearing before the Chief of Police in its computation of the time it took to obtain *judicial review* of the ordinance. *East Brooks Books,* 48 F.3d at 225. That said, it appears from review of other decisions that the time it takes to obtain an initial licensing determination under the ordinance presently at issue is at the borderline of constitutionality. *See, e.g., 1126 Baltimore,* 58 F.3d at 997 (150-day delay is not a reasonably brief time); *TK's Video, Inc. v. Denton County, Tex.,* 24 F.3d 705, 708 (5th Cir. 1994) (upholding 60-day waiting period); *Chesapeake B & M. Inc. v. Hartford County, Md.,* 831 F. Supp. 1241, 1249-50 (D. Md. 1993) (upholding 44-day waiting period), *rev'd in part, vacated in part, and remanded on other grounds,* 58 F.3d 1005 (4th Cir. 1995) (en banc); *Wolff v. City of Monticello,* 803 F. Supp. 1568, 1574 (D. Minn. 1992) (90-day waiting period not unreasonable). However, considering that the applications must be distributed to other departments for inspections, that the board may only hold the applications for thirty of those days under specified circumstances, and that businesses already established continue operating pending a licensing decision, the Court finds that this waiting period is not unreasonable.

2. Status Quo

However, not only must the waiting period be reasonable, but the status quo must be preserved during that time. *East Brooks Books,* 48 F.3d at 224. The Plaintiffs' second challenge to the ordinance relates to this issue. They claim that the ordinance does not provide for the preservation of the status quo pending judicial review, or in the event that the board fails to issue a timely licensing opinion. The Court agrees. Section 6.54.140 of the ordinance, combined with Section 6.54.020(G)(3) provide for

only a ten-day hiatus before the board's decision takes effect. Section 6.54.140 provides that a license/permit shall be valid until ten days have elapsed since the board's decision, or until a hearing on the matter is held. If at the conclusion of the hearing, the board affirms its denial of license or permit, this decision does not take effect until ten days have elapsed, in order to give the aggrieved party time to file an appeal. Section 6.54.020(G)(3). The ordinance is silent as to whether the effect of a denial is stayed after those ten days pending judicial review. The board's policies are equally silent on this issue. Although Board Policy 40 states that any denial, revocation, or suspension of a license shall not go into effect until thirty days have elapsed since the board's final decision and there has been no appeal, it does not explain what the status of a license is while an appeal is pending.

Furthermore, the ordinance does not specify what the effect would be of the board's failure to act on an application in a timely manner. The Defendants have presented the Court with Board Policy 70, which states in relevant part:

> It shall be the policy of this Board that any license or permit not acted on by the Board in the time allowed by the ordinance, due to any fault on the part of the Board or the Board's administration, shall be granted.

Def's Ex. 2 at 2. However, as the Plaintiffs have pointed out, the policy only relates to failure to act on an application due to fault by the Board. It does not encompass failure to act timely due to failure of, for example, the police or fire department to conduct its investigation within the prescribed thirty days. Moreover, this policy is inconsistent with Section 6.54.020(C)(10), which prohibits

the board from issuing a license "unless the police department has investigated the applicant's criminal history . . . ". Finally, it is unclear from the policy just how a license would be granted if the reason a license has not been issued on time is that the board has not been able to meet or to form a quorum.[4] Without any action on the past of the board, the applicant will presumably not have a tangible permit in his or her possession.

3. Judicial Review

Lastly, the Plaintiffs contend that the ordinance is invalid because it fails to provide for prompt judicial review. Again, the Court agrees with the Plaintiffs. Under the ordinance as written, an applicant can be required to wait for an indefinite period of time before obtaining judicial review of the board's decision. After a hearing is requested, the applicant should receive a hearing in fourteen days, since the board holds meetings bimonthly. § 6.54.020(D)(1). The board must then notify an applicant of the denial of his or her license within ten days after a meeting is conducted. The ordinance specifies that the applicant can then appeal from an unfavorable decision at a hearing directly to the Chancery Court of Davidson County through a petition for a writ of certiorari. § 6.54.160. The administrative record must be transmitted to the court within ten days of the hearing, § 6.54.160, however, a hearing before the court must wait at least ninety days in order to allow for the filing of a brief, response, and reply brief. Davidson County Local Rule

[4] Board Policy 20 requires that a quorum must be present in order for the board to take action.

§ 30.02. Although the appeal would at that point have precedence over other matters before the court, the scheduling of a hearing is dependent on the court's docket. Thus, the Plaintiffs are not guaranteed judicial review within any specified period of time. Moreover, the state chancellor is not required to issue an opinion within any mandated period of time. *See* Tenn. Code Ann. § 27-9-111.

The circuits are currently split with respect to the meaning of "prompt judicial review." The First, Fifth, and Seventh Circuits have concluded that access to a judicial proceeding is sufficient to constitute prompt judicial review. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas,* 62 Brook. L. Rev., 1217, 1220 (1996). Conversely, the Fourth, Sixth, and Eleventh Circuits have required a prompt judicial *determination. Id.* at 1241-42. In *East Brooks Books,* the Sixth Circuit concluded that a potential wait of over five months before a judicial ruling was impermissible. 48 F.3d at 225. It further determined that the possibility of appeal to the Tennessee state courts through a writ of certiorari did not constitute prompt judicial review precisely because this procedure did not require the courts to issue a ruling within any specified period of time. *Id.* The ordinance at issue in the present case allows for up to fifteen days for the board to hold a hearing (one day to request and fourteen days for the hearing to be held), ten days before the denial is mailed to the applicant, ten days for the board to forward a copy of the proceedings before it to the court, and a wait of at least ninety days before a state court can issue a ruling. The applicant must thus wait at least three and one-half months minimum before a court issues a ruling on its application. However, since

there are no time restraints on the court's issuance of a decision, potential delays of over five months are possible under this statute. *East Brooks Books* prohibits this kind of delay. *See also Smith v. City of Clarksville,* No. 3-94-0539 (M.D. Tenn. Mar. 14, 1996) (invalidating a licensing scheme similar to the one at issue because it failed to provide for expeditious judicial review).

The Defendants offer three possible ways to rehabilitate this ordinance. First, they contend that under the local rules, it is possible for an applicant to move the Chancery Court for an expedited briefing schedule, and pursuant to Local Rule 18.01[5], move the court to set an early trial date. They contend that while Tenn. Code Ann. § 27-9-111 provides that in appeals of board determinations, the court shall set a trial ninety days after the board files a transcript of the proceedings before it, and that the trial shall have precedence over other litigation, this statute does not *require* a court to wait ninety days before setting a case for trial. They further assert that to the extent that it does mandate this, it violates the separation of powers doctrine, as it infringes upon the court's ability to set its own docket. *See Summers v. Thompson,* 764 S.W.2d 182, 188-190 (Tenn. 1988) (Drowota, J., concurring) (discussing generally the respective powers of the judiciary and the legislature). However, it is clear that the Defendants' proposed method of judicial review would not set clear boundaries on the time that a court must make a

[5] The rule provides: "Cases shall be set for trial in one of the following ways: (a) by agreement of counsel after consultation with the Calendar Clerk for Chancery and Probate Court or the Assignment Clerk for Circuit Court; (b) by motion; or (c) by the court with notice to counsel."

decision, and thus does no pass constitutional muster under *East Brooks Books*.

Second, the Defendants contend that, unlike the ordinance in *Smith v. City of Clarksville,* the ordinance at issue does not require that any appeal be processed through a writ of certiorari at the state level. Although the ordinance at hand does provide that an applicant may "choose" to appeal to the state through a writ of certiorari, § 6.54.100(M), the ordinance by its terms does not foreclose other methods of appeal. Specifically, the Defendants maintain that an applicant can appeal by petitioning for a temporary restraining order ("TRO") and preliminary injunction. However, again, the Defendants have not directed the Court to any rule which requires a court to decide a motion for a TRO or preliminary injunction within any prescribed period of time. Thus, this procedure suffers from the same infirmities as a petition for writ of certiorari.

Finally, the Defendants have submitted to the Court Proposed New Local Rule, § 30.05, which provides that:

> If the petitioner-appellant alleges that the decision of an administrative tribunal or agency unlawfully results in the prior restraint of his or her rights that are guaranteed by the First Amendment to the U.S. Constitution, and either party requests an expedited hearing, the court shall immediately schedule a hearing, establish an expedited briefing schedule that will permit the court to adjudicate the matter promptly, and in no event later than fourteen days after the record is filed.

However, the proposed rule suffers from several problems, the most important of which is that it is a *proposed* rule,

and there is no guarantee that it will be adopted by the courts. Furthermore, the text of the rule is unclear, as it does not specify exactly *what* must be done in fourteen days: the scheduling of a hearing, and adjudication, or both. Thus, the Court cannot conclude that this local rule meets the expeditious judicial review requirements of the First Amendment. That aside, it appears to the Court that this kind of rule is exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine. Although the legislature may not be able to require the courts to decide a matter within a prescribed period of time, the directives of the First Amendment may still be met if an ordinance provides that a permit or license should issue in the event that the court does not adjudicate a matter within a given time (which must be less than five months per *East Brooks Books*.

4. Disabling Provisions

Because the Court has determined that the ordinance is unconstitutional because it does not preserve the status quo or provide for prompt judicial review, it does not need to reach the issue of whether the disabling provisions of the ordinance are unconstitutional.

B. Irreparable Harm

Nonobscene nude dancing is constitutionally-protected activity within the scope of the First Amendment. *Barnes v. Glen Theatres. Inc.*, 501 U.S. 560, 565-66 (1991); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d at 1075. The ordinance, if allowed to take effect, would condition the Plaintiffs exercise of their First Amendment freedoms on the receipt of a license, and would prohibit

them from exercising this right without a license. It is well-established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

The Defendants have urged this Court to find that there is no immediate irreparable injury because operators do not even have to file an application until March of next year, and although entertainers must file their applications by November 15th of this year, the board will not rule on their applications until, at the earliest, fifty days later. However, in the case of entertainers, the mere fact that they have to file an application infringes on their First Amendment freedoms, since the application requires them to submit a picture, a list of prior employers, prior addresses, and prior convictions of a sexual nature or involving moral turpitude. Furthermore, since the ordinance is already in effect, operators are already subject to it and live under the threat of having to submit licenses to the board. The Court finds that this is sufficient immediate irreparable harm for it to enjoin the provisions of the ordinance relating to operators.

C. Public Interest

The Court finds that the issuance of an injunction at this point would be in the public interest: it "is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.,* 23 F.3d at 1079. Although it is also in the public interest to ameliorate the harmful side effects that sexually-oriented businesses may promote, as specified in the preamble to the ordinance, it

is not in the public interest to do this through a statute that violates an individual's First Amendment rights.

D. Possibility of Substantial Harm to Others

There is very little possibility of substantial to others if the injunction is not issued. Although the ordinance is directed at curtailing certain crimes and health hazards which are the "secondary effects of adult entertainment establishments," *see* Bill No.097-796, there are other means of regulating these effects that will continue to operate while the injunction is in effect, for example, the police and fire departments.

III. CONCLUSION

The Court finds that the ordinance must be enjoined in its entirety because it fails to maintain the status quo while an initial determination of the board is pending, and does not provide for prompt judicial review. Although the ordinance is severable, § 56.54.170, the fact that it fails to provide expeditious judicial review requires the Court to invalidate it in its entirety, as none of the provisions are salvageable. Accordingly, the Metropolitan Government of Nashville and Davidson County Tennessee, and Emmett Turner, Chief of Police, are enjoined from enforcing any of the provisions of this ordinance until otherwise directed by this Court.

An order consistent with this memorandum will be filed contemporaneously.

Entered this the 5th day of December, 1997.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

No. 03-6521

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEJA VU OF NASHVILLE, INC., A TENNESSEE CORPORATION, ET AL.,	)	
Plaintiffs-Appellees,	)	
v.	)	ORDER
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	)	(Filed Dec. 16, 2005)
Defendant-Appellant.	)	

BEFORE: BOGGS, Chief Judge; ROGERS, Circuit Judge; and SHADUR,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

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* Hon. Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Clerk
Leonard Green, Clerk
[illegible]

U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

C.R.C.P. Rule 106

RULE 106. FORMS OF WRITS ABOLISHED

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be brought upon

the relation and complaint of any person. The Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within twenty days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating

portions of the record not set forth in the order which it desires to place before the Court. The cost of preparing the record shall be advanced by the plaintiff, except that the Court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the Court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the Court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within forty days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within forty days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within thirty days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within fifteen days after service of the answer brief.

(VIII) The Court may accelerate or continue any action which, in the discretion of the Court, requires acceleration or continuance.

(IX) In the event the Court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the Court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and such amendment shall relate back to the date of filing of the original complaint.

Current with amendments received through December 15, 2005

U.S.C.A. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support

the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

T.C.A. § 27-9-111 (2002)

27-9-111 Hearing – Findings.

(a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The judge shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof.

(e) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in § 27-9-109 within seven (7) days of the grant of the writ of certiorari.

[Code 1932, § 9014; Acts 1951, ch. 261, § 1; T.C.A. (orig. ed.), § 27-911; Acts 1987, ch. 28, §§ 1-3; 1998, ch. 794, § 1; 2002, ch. 615, § 1.]

Compiler's Notes. The portion of this section which requires that proof at a hearing be taken by deposition has been superseded by Tenn. R. Civ. P. 43.01 which provides that witnesses shall give testimony orally, under oath, in open court.

Acts 2002, ch. 615, § 2 provided that the 2002 amendment to (e) shall not take effect until such time as the United States Supreme Court has denied the petition for a writ of certiorari filed by the Metropolitan Government of Nashville and Davidson County in the case of DejaVu, Inc. v. Metropolitan Government, 274 F.3d 377 (6th Cir. 2001), or if the Untied States Supreme Court grants a writ of certiorari, the 2002 amendment shall not take effect until such time as the United States Supreme Court affirms the Sixth Circuit's opinion on the issue of "prompt judicial review." If the United States Supreme Court reverses the Sixth Circuit's opinion on "prompt judicial review" the amendment shall never take effect. On May 13, 2002, the United States Supreme Court denied the petition for a writ of certiorari. Metropolitan Government of Nashville and Davidson County, et al. v. DejaVu of Nashville, Inc., et al., 122 S.Ct. 1952, 152 L.Ed.2d 855.

Amendments. The 2002 amendment inserted "shall immediately grant the writ of certiorari and" in the first sentence of (e).

Effective Dates. Acts 2002, ch. 615, § 2. May 13, 2002.

T.C.A. § 27-9-111 (1998)

27-9-111 Hearing – Findings.

(a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The judge shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof.

(e) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in § 27-9-109 within seven (7) days of the grant of the writ of certiorari.

[Code 1932, § 9014; Acts 1951, ch. 261, § 1; T.C.A. (orig. ed.), § 27-911; Acts 1987, ch. 28, §§ 1-3; 1998, ch. 794, § 1.]

Compiler's Notes. The portion of this section which requires that proof at a hearing be taken by deposition has been superseded by Tenn. R. Civ. P. 43.01 which provides that witnesses shall give testimony orally, under oath, in open court.

Amendments. The 1998 amendment added (e).

Effective Dates. Acts 1998, ch. 794, § 2. April 23, 1998.

T.C.A. § 27-9-111 (1997)

27-9-111 Hearing – Findings.

(a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The judge shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof.

[Code 1932, § 9014; Acts 1951, ch. 261, § 1; T.C.A. (orig. ed.), § 27-911; Acts 1987, ch. 28, §§ 1-3.]

Title 6, Metropolitan Code of Laws
Ch. 6.54 (1999 Version)

Chapter 6.54

SEXUALLY ORIENTED BUSINESSES

Sections:

6.54.010	**Definitions.**
6.54.020	**Sexually oriented business licensing board.**
6.54.030	**License required.**
6.54.040	**Application for license.**
6.54.050	**Standards for issuance of license.**
6.54.060	**Permit required.**
6.54.070	**Application for permit.**
6.54.080	**Standards for issuance of a permit.**
6.54.090	**Fees.**
6.54.100	**Display of license or permit.**
6.54.110	**Renewal of license or permit.**
6.54.120	**Hours of operation.**
6.54.130	**Responsibilities of the operator.**
6.54.140	**Prohibitions and unlawful sexual acts.**
6.54.150	**Revocation or suspension of license/ permit.**
6.54.160	**Penalties and prosecutions.**
6.54.170	**Invalidity of part.**

6.54.010 Definitions.

For the purpose of this chapter, the words and phrases used in this chapter shall have the following meanings, unless otherwise clearly indicated by the context:

A. "Aggravated rape" means as defined in the Tennessee Code Annotated Section 39-15-502.

B. "Aggravated sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-504.

C. "Crimes of a sexual nature" means the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

D. "Current entertainer" means an entertainer performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

E. "Employee" means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of a sexually oriented business.

F. "Entertainer" means any person who provides live entertainment within a sexually oriented business as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not

entertainment is provided as an employee or an independent contractor.

G. "Existing sexually oriented business," means a sexually oriented business that is operating within the metropolitan area as of March 1, 1999.

H. "Indecent exposure" means as defined in the Tennessee Code Annotated Section 39-13-511.

I. "Location" means a single site for which only one use and occupancy permit would be required.

J. "Metropolitan area" means the general services district of the metropolitan government of Nashville and Davidson County.

K. "Metropolitan council" means the legislative body of the metropolitan government of Nashville and Davidson County, Tennessee.

L. "New entertainer" means an entertainer not performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

M. "New sexually oriented business" means a sexually oriented business not in operation as of March 1, 1999.

N. "Obscenity" means as defined in the Tennessee Code Annotated Sections 39-17-901(10) through (14).

O. "Operator" means any person, partnership, or corporation operating, conducting or maintaining a sexually oriented business.

P. "Patronizing prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

Q. "Promoting prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

R. "Prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

S. "Public indecency" means as defined in the Tennessee Code Annotated Section 39-13-511.

T. "Rape" means as defined in the Tennessee Code Annotated Section 39-15-503.

U. "Rape of a child" means as defined in the Tennessee Code Annotated Section 39-15-522.

V. "Sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-505.

W. "Sexual exploitation of a minor" means as defined in the Tennessee Code Annotated Sections 39-17-1003, 39-17-1004 and 39-17-1005.

X. "Sexually oriented" means any exhibition of any motion pictures, films or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."

Y. "Sexually oriented business/establishment" means any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis

on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein. "Sexually oriented business/establishment" also means any commercial establishment to which the public, patrons or members are invited or admitted and which are so physically arranged as to provide booths, separate from the common areas of the premises for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos.

1. "Sexually oriented bookstore" means an establishment having a majority of its stock in trade or a majority of its floor space in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

2. "Sexually oriented nightclub" means a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which regularly features live performances that are characterized by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

3. "Sexually oriented theater" means an enclosed building regularly used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

4. "Sexually oriented video store" means a commercial establishment having a majority of its stock or a majority of its floor space dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

a. "Sexually oriented videos" means a video, CD, laser disk, or similar medium with a cover that depicts "specified sexual activities" or "specified anatomical areas" or a transparent or less than opaque cover through which "specified sexual activities" or "specified anatomical areas" can be viewed.

Z. "Sexually oriented entertainment" means the regular presentation, for a fee or incidentally to another service, of material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified

anatomical areas" as defined in this section for observation by patrons therein.

AA. "Specified anatomical areas" means:

1. Less than completely and opaquely covered:

a. Human genitals, pubic region,

b. Buttocks,

c. Female breasts below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely opaquely covered.

BB. "Specified sexual activities" means:

1. Human genitals in a state of sexual stimulation or arousal:

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

CC. "Statutory rape" means as defined in the Tennessee Code Annotated Section 39-15-506. (Amdt. 1 § 1 with Ord. 99-1503 §§ 1-3, 1999; Ord. 97-1022 § 1, 1997; amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 3 §§ 1 and 2 with Ord. 97-796 § 2 (part), 1997)

6.54.020 Sexually oriented business licensing board.

A. Establishment. A sexually oriented business licensing board is created and designated the metropolitan

sexually oriented business licensing board (herein "board").

B. Membership – Terms.

1. The board shall consist of five members, who shall have been residents of the metropolitan area for not less than one year, and who shall continue to be eligible so long as they reside in the metropolitan area, to be appointed by the mayor and confirmed by a majority vote of the metropolitan council.

2. At least one of the five members shall be an attorney, and one of the five members shall be a health provider.

3. Of the five members first appointed, two shall be appointed for a term of two years, and two shall be appointed for a term of three years, and one shall be appointed for a term of four years. Thereafter, each member shall be appointed for a term of four years, and shall serve until his/her successor is appointed. Any vacancy other than the expiration of terms shall be filled for the unexpired term.

C. Election of Officers – Term. The board shall organize by the election of a chair and a vice-chair, who shall serve for a period of one year or until a successor shall have been chosen.

D. Meetings – Quorum Required – Minutes and Transcript.

1. The board shall hold two regular meetings each month at a time fixed by the board, and may hold such special meetings as may be necessary.

2. The attendance of at least a majority of the members of the board, not including unfilled positions, shall be required to constitute a quorum for the purpose of transacting business.

3. Minutes shall be kept of the meetings in permanent form and a record shall be kept of the action of the board with respect to every application for a license and/or a permit. The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits.

4. No transcript of the proceedings had before the board shall be in any form other than narrative, unless the board shall have been requested to provide for an exact copy of the testimony by an interested party at least twenty-four hours prior to a board meeting. The cost of an exact copy shall be borne by the person requesting the same.

E. Powers and Duties.

1. The board shall have jurisdiction over the licensing, regulating and controlling of all sexually oriented establishments as provided in this chapter, located in the metropolitan area.

2. The board may promulgate such bylaws, rules and regulations not inconsistent with state law, the Metropolitan Charter, or any ordinance, as it deems appropriate for the conducting of its business.

3. The board has the authority to subpoena witnesses to testify before the board.

F. Inspectors – Authority. The board is empowered to employ suitable person(s) as inspectors which inspectors shall not hold any civil service status. The board shall prescribe the duties of such inspectors so as to enforce the applicable provisions of this title.

G. Procedures for Hearings. This section shall apply to all hearings by the board including but not limited to hearings for revocation, suspension or denial of a license/permit.

1. Upon receiving a written request for a hearing, the board shall send the party requesting the hearing a notice stating the time and place of the hearing and the right to be represented by counsel.

2. At the hearing, the party requesting the hearing shall appear on his/her own behalf or be represented by counsel. All witnesses shall be sworn. The chair shall allow the party requesting the hearing to present witnesses on his/her own behalf and to cross-examine all witnesses testifying against him/her.

3. All decisions of the board shall be in writing, setting forth the findings of the board, and shall be signed by the chair or vice-chair.

4. Minutes shall be kept of all proceedings before the board in permanent form and a record shall be kept of the actions of the board with respect to all hearings.

5. A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. The record must be maintained by the board for a period of ninety days. Such record or any part thereof shall be transcribed at the request of any party at such party's expense.

6. The board will arrange for a court reporter to be present at any hearing after an initial adverse administrative decision. (Amdt. 1 § 14 with Ord. 99-1503, 1999; Ord. 97-1022 § 3, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.030 License required.

A. Except as provided in subsection F of this section, from and after March 1, 1999, no sexually oriented business shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

B. Any person, partnership or corporation which desires to operate more than one sexually oriented business must have a license for each establishment.

C. Only one license may be issued for each sexually oriented business location.

D. No license or interest in a license may be transferred to any person, partnership or corporation.

E. It is unlawful for any entertainer or operator to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business. It is unlawful for any employee to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business while sexually oriented entertainment is being presented.

F. All existing sexually oriented businesses, as defined in Section 6.54.010, must submit an application for a license by March 15, 1999, or cease operations. All

existing sexually oriented businesses which apply for a license by March 15, 1999, may continue to operate the sexually oriented business described in the application even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.040(E)(3). All new sexually oriented businesses, as defined in Section 6.54.010, may submit an application at any time but may not operate until a license is granted except as permitted in Section 654.040(E)(4). (Ord. 99-1503 §§ 4, 5, 1999; Ord. 97-1022 § 5, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.040 Application for license.

A. Application.

1. Any person, partnership, corporation or any other entity desiring to secure a license shall make application to the board. The applicant shall file the original application with six copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to: the police department, the department of codes administration, the health department, and the applicant.

2. Application forms shall be available at the office of the board.

3. The application form shall include all the information indicated in subdivisions (5)(a) through (5)(l) of this subsection.

4. The following persons must be listed in the license application for any sexually oriented business: any partner of a partnership who will participate in the day-to-day

operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will participate in the day-to-day operation of the business.

5. The applicant shall furnish the following information under oath:

a. Name and address of the applicant, including all aliases (business address is sufficient);

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. Whether the applicant previously operated in this or any other county, city or state under a sexually oriented business license/permit or similar business license/permit. Whether the applicant has ever had such a license/permit revoked or suspended, within the last two years from the date of application, the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;

e. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

f. All judgements by a court within the past two years for violations of the metropolitan zoning Section 17.64.26;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

h. The address of the sexually oriented business to be operated by the applicant;

i. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation of the business;

j. If the applicant is a partnership, joint venture, or any other type of business, the application shall specify the name and address of all persons who will be involved in the day-to-day operation of the business;

k. A statement by the applicant that he/she is familiar with the provisions of this chapter and is in compliance with them.

6. If the applicant intends to have booths on the premises for the purpose of viewing sexually oriented movies, sexually oriented films, or sexually oriented videos, then in addition, the applicant shall provide the board, with his/her application, a diagram, drawn to scale, of the premises including the location and layout of all booths and the location of the clerk/manager's stand or

counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared.

B. Inspections and Investigations.

1. The codes department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the unique physical layout requirements set out in Section 6.54.050(A)(1) of this chapter. The health department shall inspect the premises to insure compliance with applicable health code statutes. ordinances, and regulations. The police department shall investigate the applicant's criminal history collecting the applicant's fingerprints and 2 x 2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of both the inspections and the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no sexually oriented business/adult entertainment zoning code violations and/or no applicable criminal history. Subject to Section 6.54.150.

2. If a diagram is required to be submitted under subsection (A)(6) of this section, then the code inspector shall confirm the layout of the booths complies with the submitted diagram and the requirements set out in Section 6.54.050A.

3. The police department shall complete its investigation and the codes department and health department

shall complete their respective inspections and shall communicate the results to the board in writing within twenty days of receipt of the application. The written investigation from the codes department and health department shall end with substantially one of the following statements:

> The location at _____ complies with Chapter 6.54 and the applicable health code sections of the metropolitan code.
>
> The location at _____ does not comply with Chapter 6.54 and the applicable health code sections of the metropolitan code. It is in violation of the following provisions: Section numbers of code violations.

The writing from the police department shall end with substantially the following statement:

> The police department's criminal record check indicates that the persons listed on the application have/have not committed a crime of a sexual nature within the past five years. The persons listed on the application have committed the following crimes of a sexual nature:
>
> Name Crime Date

4. If the building/structure has a valid use and occupancy permit, the applicant shall provide the board with a copy of the valid use and occupancy permit which shall be made part of the file.

C. Board Action on Inspection and Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department and the

inspections by the codes department, and health department the board will meet and determine if the applicant is in compliance with this code section and the applicable health statutes, ordinances and regulations.

2. If the board determines that the applicant is in compliance with the applicable health statutes, ordinances and regulations, and the applicant has not committed a crime of a sexual nature, as defined in Section 6.54.010, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application, then the board shall grant the license. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

3. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application.

4. In the event the board denied the application in accordance with Section 6.54.050(B)(2), such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation and inspections.

5. If it is determined by the board, using the application and the inspection reports that the applicant has violated the provisions of the zoning code applicable to sexually oriented/adult entertainment businesses within the past two years, then the applicant is ineligible for a license for one year from the date the citation was sustained. A violation of the zoning code shall be evidenced by

a judgement of a court. The fact that the judgement is being appealed shall have no effect on the disqualification of the applicant until the judgement is reversed.

6. Any investigation reports or inspection reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her license and shall be treated by the board as if that department approved the application.-

7. If a diagram is required under subsection (A)(6) of this section and based on the code inspection, the board determines that the actual structure does not comply with Section 6.54.050(A) or the submitted diagram, then the applicant is not in compliance with this code section and the license shall be denied in accordance with Section 6.54.053(A) and (B).

8. If in the course of the investigation it is discovered any false or misleading statement or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.050(B)(3). False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

9. Within fifteen days of receiving the results of the investigation conducted by the police department, and inspection reports from the codes department, and health department, if the board shall determine that the applicant is not in compliance with this code section, the zoning code or the applicable health statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to comply with applicable statutes, ordinances and

regulations. This notice shall specify the violation. If the applicant can come into compliance as described in subsection D of this section, the denial shall not take effect. The notice shall also specify that the applicant may request a hearing within five days, cure the violation within fifteen days and request reinspection or request an extension of time.

10. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection (C)(1) of this section, unless otherwise agreed to by the applicant.

11. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

12. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his/her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his/her refusal to submit to or cooperate

with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such license and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(10) of this section.

D. Extensions of Time for the Applicant.

1. If the license is denied under subsection (C)(5) or (C)(7) of this section, the applicant may reinstate his/her application by notifying the board in writing that he/she has come into compliance and requests reinspection.

a. The applicant has fifteen days from the mailing of the denial described in subsection (C)(5) or (C)(7) of this section to cure the violation and notify the board or to request an extension pursuant to subsection (D)(2) of this section. The applicant has the responsibility to contact the board.

b. Once contacted, the board shall notify the appropriate inspector the next business day that the applicant believes he/she has come into compliance.

c. Upon notification by the board, the appropriate inspector shall return to the location for reinspection and shall submit another written report as indicated in subsection (B)(3) of this section. The inspector has five days from the date he/she was notified by the board to reinspect the premises and inform the board as to whether the applicant has come into compliance in the same manner described in subsection (B)(3) of this section and using the same language required in subsection (B)(3) of this section.

d. Based on the report of the inspector(s), the board shall determine if the applicant has come into compliance,

and if so the board shall issue the license at the next regular meeting. The next meeting shall be held no later than fifteen days after the inspection report is filed with the board. Any inspections not filed with the board in the time period specified in this section will be treated as described in subsection (C)(6) of this section.

e. If the applicant fails to either contact the appropriate inspector to report that the code violations have been corrected, or if the code violations have not been corrected, then the application is denied in accordance with subsection (C)(5) or (C)(7) of this section.

2. If the process of curing the violation requires more time than that provided in subsection (D)(1) of this section, the applicant may request an extension from the board. If the applicant does not make such a request in the time allotted, the application is denied in accordance with subsections (C)(5), (C)(7) or (D)(3) of this section.

a. The request for an extension must be made in writing within five days from the denial described in subsection (C)(5) or (C)(7) of this section.

b. The board shall hear the applicant's request for an extension at the next regular meeting. The next meeting shall be held no later than fifteen days after the request for the extension is received by the board.

c. The hearing on the extension shall follow the same rules as set out in Section 6.54.020(G) except that the decision of the board shall grant or deny the extension and a decision to grant an extension shall take effect immediately.

d. An extension shall only be granted when the codes inspector and the health inspector agree that an extension

will not endanger the health or safety of the community and the board determines that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

3. If the applicant fails to follow the procedure set out in this subsection then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in subsections (D)(1) or (D)(2) of this section requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the denial described in subsections (C)(5) and (C)(7) of this section shall be treated as a denial of the application.

E. Denial of the License Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's notification.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

2. Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For an existing sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed

to a court, and if the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 654.150(A)(8). (Amdt. 1 §§ 2, 3 with Ord. 99-1503 §§ 6-30, 1999; Ord. 97-1022 §§ 6-39, 1997; amended during 9-97 supplement; Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.050 Standards for issuance of license.

A. Physical Layout of Sexually Oriented Business.

1. Any sexually oriented business having available for customers, patrons or members any booth, for the viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos, shall submit a diagram under Section 6.54.040(A)(6) and the diagram submitted must be substantially the same as the structure observed by the inspector. Further, the structure and the diagram shall comply with the following requirements:

a. Access. Each booth shall be totally accessible to and from aisles and public areas of the sexually oriented business and shall be unobstructed by any door, gate, lock or other control-type devices.

b. Construction. Every booth shall meet the following construction requirements:

i. Each booth shall be separated from adjacent booths and any nonpublic areas by a solid or opaque wall;

ii. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same;

iii. All walls shall be solid and without any openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth textured and easily cleanable;

iv. The floor must be light colored, nonabsorbent, smooth textured and easily cleanable; and

v. The lighting level of each booth shall be a minimum of ten footcandles at all times as measured from the floor.

c. Occupants. Only one individual shall occupy a booth, at any time. No occupant of a booth shall engage in any type of copulation, masturbation or the display of specified anatomical areas as defined herein or cause any bodily discharge of urine, feces or semen while in the booth. No individual shall damage or deface any portion of the booth.

2. The provisions enunciated in subdivision 1 of this subsection shall not apply to bathrooms unless the bathroom contains any equipment which would allow the viewing of sexually oriented films, sexually oriented movies, sexually oriented videos.

B. Applicant.

1. To receive a license to operate a sexually oriented business, an applicant must meet the following standards:

a. If the applicant is an individual, the applicant shall be at least eighteen years of age;

b. If the applicant is a corporation, all officers, directors and stockholders required to be named under Section 6.54.040(A)(5)(i) shall be at least eighteen years of age;

c. If the applicant is a partnership, joint venture, or any other type of organization where two or more persons have a financial interest, all persons having a financial interest in the business and who are involved in the day-to-day operation of the business shall be at least eighteen years of age.

2. No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(i) and no partners required to be named under Section 6.54.040(A)(5)(j) convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a license for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the conviction by the trial court to the date of the application. The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant until the trial court's conviction is reversed.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading

information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 654.010, then the applicant shall not be eligible to receive a license until the time period described in subsection (B)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

d. If the misleading statements or omissions referred to violations of Section 17.36.260 of the zoning code, then the applicant shall not be eligible to receive a permit until the time period described in subsection (B)(5) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. An applicant having had a sexually oriented business/establishment license or similar license/permit revoked within the last year shall not be eligible for a license for one year from the date of revocation.

5. No applicant shall have been found to have previously violated Section 17.36.260 of the metropolitan zoning code applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgement of a court within one year immediately preceding the date of the application. If such violations exist, the applicant shall be ineligible for a license for one year from the date the citation was sustained. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant until the trial court's judgement is reversed.

6. If the applicant plans to have or has booths, for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos, then the booths must comply with the requirements set out in subsection A of this section. (Ord. 99-1503 §§ 31-49, 1999; Ord, 97-1022 §§ 40-45, 1997; amended during 9-97 supplement; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.060 Permit require.

A. Except as provided in subsection B of this section, from and after March 1, 1999, no person shall be an entertainer in a sexually oriented business within the metropolitan area without first obtaining a permit issued by the board.

B. All current entertainers, as defined in Section 6.54.010, wishing to continue to perform sexually oriented entertainment must submit an application for a permit by March 15, 1999. All current entertainers, who apply for a permit by March 15, 1999, may continue to perform sexually oriented entertainment even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.070(D)(3). All new entertainers, as defined in Section 6.54.010, may submit an application at any time but may not perform sexually oriented entertainment until a permit is granted except as permitted in Section 6.54.070(D)(4). (Ord. 99-1503 § 50, 1999; Ord. 97-1022 §§ 46, 47, 1997; Amdt. 7 (part) and Amdt. 6 § 7 with Ord. 97-796 § 2 (part), 1997)

6.54.070 Application for permit.

A. Application.

1. Any person desiring to secure a permit shall make application to the board. The applicant shall file the original application with three copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to the Metropolitan Nashville police department and the applicant.

2. Application forms shall be available at the office of the board. Applicants may obtain their application from the codes department. Applicants must also submit with each application two 2 x 2 photos.

a. · Background Check. All background checks shall be completed by the metropolitan police department. The police department may be notified of a need for a

background check in two ways. The applicant brings her application, including one of the two photos to the police department and has her fingerprints taken at the police department. The police then begin the background check and once completed, send the background check, application, fingerprint card, and photo to the office of the board. In the alternative, the applicant can obtain fingerprints as described below, turn into the board a complete application including, fingerprints and two photos and the board shall send the complete application to the police department requesting a background check. The police will return the complete application with the completed background check to the office of the board.

b. Fingerprints. The applicant may have his/her fingerprints completed by the police department or other qualified person.

c. Fees. If the applicant brings her application to the police department, the police department shall not charge the applicant any additional fee for fingerprinting or a background check. If the applicant has the fingerprinting performed without informing the police department that it is for his/her application for a sexually oriented entertainer permit, then the applicant may retain the receipts for the fingerprinting and give them to the codes department when the applicant files his/her application. The codes department shall subtract the expenses for the fingerprints from the one hundred dollar permit fee, and the applicant shall pay the difference. This same procedure applies if the applicant has his/her fingerprints taken by a qualified person other than the metropolitan police department. Photos can be taken by the codes department at no additional fee or the applicant may have his/her photo taken elsewhere.

3. The application form shall include all information indicated in subdivisions (4)(a) through (4)(h) of this subsection.

4. The applicant shall furnish the following information under oath:

a. Name and address including all aliases;

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. The applicant's height, weight, color of eyes, and hair (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

e. Whether the applicant previously entertained in this or any other county, city, or state under a sexually oriented business license/permit or similar business license/permit within the two last years. For whom the applicant was employed or associated at the time. Whether the applicant has had such a license/permit revoked or suspended within the two last years and the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

f. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in

Section 6.54.010, punishable as a felony that have occurred within the past five years;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature); and

h. A statement by the applicant that he/she is familiar with the provisions of this chapter and is in compliance with them.

B. Investigation. The police department shall investigate the applicant's criminal history by collecting the applicant's fingerprints and 2 x 2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history. Subject to Section 6.54.150.

C. Board Action on the Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and determine if the applicant has not been convicted of a crime of a sexual nature, as defined in Section 6.54.010, has not had a similar type of permit/license revoked in the last two years, is at least eighteen

years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the permit shall be deemed approved and sent to the applicant by United States mail to the address listed on the application.

3. In the event the board denied the application in accordance with Section 6.54.080, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation.

4. Any investigation reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if that department approved the application.

5. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.080. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

6. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or the revocation of a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection (D)(1) of this section, unless otherwise agreed to by the applicant.

7. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

8. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his or her refusal to submit to or cooperate with any investigation required by this chapter. shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(6) of this section.

D. Denial of the Permit Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's decision.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

2. Any denial of the application for a permit may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may also initiate proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For any current entertainer, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that

decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8). Adverse decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new entertainer, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 654.150(C)(8).

E. The permit carried by the entertainer shall contain only the following information:

1. A photo identification as provided by the applicant;

2. A computer-generated number assigned to each applicant, corresponding to the file maintained on each applicant by the sexually oriented business licensing board; and

3. The applicant's date of birth as indicated on the application. (Amdt. 1 §§ 4-7 with Ord. 99-1503 §§ 51-64, 1999; Ord. 97-1022 §§ 48-62, 1997; amended during 9-97

supplement; Amdt. 7 (part), Amdt. 6 § 5 (part) and Amdt. 1 with Ord. 97-796 § 2 (part), 1997)

6.54.080 Standards for issuance of a permit.

A. Applicant. To receive a permit as an entertainer, an applicant must meet the following standards:

1. The applicant shall be at least eighteen years of age.

2. No applicant convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a permit for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the application to the date of the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year

from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 654.010. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a permit until the time period described in subsection (A)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. The applicant shall not have had a sexually oriented business permit/license or similar business permit revoked within the last year immediately preceding the application. (Amdt. 1 § 8 with Ord. 99-1503 §§ 65-70, 1999; Ord. 97-1022 § 63 (part), 1997)

6.54.090 Fees.

A. A license fee of five hundred dollars shall be submitted with the application for a license. If the application is denied, one-half of the fee shall be returned

B. A permit fee of one hundred dollars shall be submitted with the application for a permit. If the application is denied, one-half of the fee shall be returned. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.1.00 Display of license or permit

A. The license shall be displayed in a conspicuous public place in the sexually oriented business.

B. The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours and shall be displayed upon request of any member of the police department, health inspector, or board inspector.

C. If the business for which a license was issued ceases to exist in that a majority of the business assets have been liquidated, or the business has closed and ceased operations, then the license shall be returned to the board and cease to be valid. (Ord. 99-1503 §§ 67(2), 71, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.110 Renewal of license or permit.

A. Every license/permit issued pursuant to this chapter will terminate at the expiration of one year from the date of issuance unless sooner revoked and must be renewed before operation the following year.

B. Any operator desiring to renew a license or any entertainer desiring to renew a permit shall make application to the board. The application for renewal must be filed not later than sixty days before the license/permit expires. The original application for renewal plus the number of copies listed in Section 654.040A or 6.54.070A shall be filed and dated by the board.

C. The board shall send a copy to the same departments who would receive a copy of the initial application. These departments shall process the application in the same manner and within the same time limits which apply to the initial application.

D. The board shall provide the applicant with a copy of the application from the previous year and a new application form.

E. The renewal form shall be the same form described in Section 6.54.040A for a license and Section 6.54.070A for a permit except as indicated below in subsection H of this section.

F. For a renewal, the applicant may fill out the new form in its entirety or fill in any information which has changed over the year and is now different than the information indicated on the application from the prior year. The renewal must also include an updated background check by the police department and an updated 2 x 2 photo. The renewal does not require resubmission of fingerprints submitted with the initial application. However, if new or additional persons are involved in the day to day operation of the licensed business those persons must submit fingerprints as described above.

G. If the applicant chooses to only include information concerning items which have changed, he/she will swear to the accuracy of both the information contained in the renewal form and the information attached from the prior year.

H. The renewal application form shall be the same form described in Section 654.040A for a license or Section 6.54.070A for a permit except the final line shall state:

> I swear the information I have given in the application from 199___ is still accurate and any facts or circumstances which have changed are indicated in this application for a renewal of the license/permit.

_____

signature of applicant

I. A license renewal fee of five hundred dollars shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars shall be assessed against the applicant who files for a renewal less than sixty days before the license expires. If the renewal is denied, one-half of the fee collected shall be returned.

J. A permit renewal fee of one hundred dollars shall be submitted with the application for renewal. In addition to such renewal fee, a late penalty of fifty dollars shall be assessed against the applicant who files for renewal less than sixty days before the permit expires. If the renewal is denied, one-half of the fee shall be returned.

K. The application for a renewal is subject to the same rules and limitations as the initial application.

L. When an application for renewal is denied, the applicant has the right to request a hearing within five days of the board's decision.

1. The request shall be in writing and filed with the board within five days of the board's decision.

2. The board shall hear all the evidence pertaining to the denial of the renewal application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

3. At the hearing, the applicant may present evidence as to why his/her renewal application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

4. The board shall affirm or reject the denial of the renewal application at the hearing and in writing state the reasons for the board's decision.

5. The denial of the renewal application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

6. Any adverse administrative decision regarding the renewal of a license/permit that is appealed to any court shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. If a court fails to rule within forty days of the filing of an appeal, a new license/permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the renewal for a

license/permit then that license/permit shall be revoked in accordance with Section 6.54.150(A)(8) and (C)(8). Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

M. The denial of any renewal for a license/permit may be appealed to the circuit or chancery courts of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the applicant or the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with the petition for a writ of certiorari. (Amdt. 1 § 9 with Ord. 99-1503 §§ 72, 73, 1999; Ord. 97-1022 §§ 63 (part), 64-68, 1997; amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.120 Hours of operation.

A. All sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays.

B. All public areas of every sexually oriented business shall be open to inspection at any time during normal business hours by the following departments: police, codes, board inspector, and health. (Ord. 99-1503 § 74, 1999; Ord. 97-1022 § 63 (part), 1997; Amdt. 7 (part) and Amdt. 6 § 8 with Ord. 97-796 § 2 (part), 1997)

6.54.130 Responsibilities of the operator.

A. An operator is responsible for the conduct of all entertainers while on the licensed premises and any act or omission of any entertainer constituting a violation of the provisions of this chapter shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended, renewed or a penalty assessed subject to the limits described in Section 6.54.150(E).

B. No employee on the premises for furthering the business, but not including independent contractors on the premises for repairs and construction, of a sexually oriented business shall allow any minor to loiter around or to frequent a sexually oriented business or to allow any minor to view sexually oriented entertainment as defined herein on the premises of a licensed business.

C. Every sexually oriented business shall be physically arranged in such a manner that the entire interior portion of any booths, wherein sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos are viewed, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes, or any other obstruction whatsoever. Further, any wall forming any portion of the booths, shall be solid and without any openings, extended from the floor to a height of not less than six feet. This section shall be construed in conjunction with Section 6.54.050A.

D. It is unlawful to install enclosed booths for the purpose of viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos. The licensee shall be responsible for and shall provide that any booth, or area used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos shall be readily accessible at all times and shall be continuously open to view in its entirety.

E. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

> This Sexually Oriented Business is regulated by The Metropolitan Code of Nashville and Davidson County, Chapter 6.54 which provides that no customer shall be permitted to have any physical contact with any entertainer on the premises during any performance. All performances shall only occur upon a stage at least eighteen inches above the immediate floor level at least three feet from the nearest customer.

F. It shall be the duty of the operator, to ensure that the line of sight and view area between the common area and any booths remain unobstructed by any doors, walls, merchandise, display racks or other materials at any time that any patron is permitted access to any booth. Entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall not place any obstructions in front of any booths at any time that any patron is permitted access to any booth.

G. It shall be the duty of the operator and employees on the premises for furthering the business, not including independent contractors on the premises for repairs or

construction, to ensure that the illumination in booths, described in Section 6.54.050(A)(1)(b)(v) is maintained at all times that any patron is present on the premises.

H. No operator shall allow openings of any kind to exist between booths, and no person, including entertainers and employees shall make or attempt to make an opening of any kind between any booths.

I. The operator or his/her designee shall, during each business day, regularly inspect the walls between the booths, to determine if any openings or holes exist. If such openings exist it is the duty of the operator to repair the damage as soon as possible. No patron shall be permitted access to a booth, where an opening or a hole exists. It shall be the duty of the operator to ensure those booths are unoccupied by patrons until the opening is repaired or covered. (Amdt. 1 § 10 with Ord. 99-1503 §§ 75-84, 1999; Ord. 97-1022 §§ 63 (part), 69-73, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.140 Prohibitions and unlawful sexual acts.

A. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, of a sexually oriented business shall permit to be performed, offer to perform, perform or allow customers, employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia on the premises.

B. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall

encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any entertainer, operator or employee.

C. No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer. (Ord. 99-1503 §§ 85-87, 1999; Ord. 97-1022 § 63 (part), 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 §§ 3, 4 and Amdt. 4 with Ord. 97-796 § 2 (part), 1997)

6.54.150 Revocation or suspension of license/permit.

A. The board shall revoke a license for any of the following reasons:

1. Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The licensee was or has become ineligible to obtain a license under Section 6.54.050(B);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The licensee knowingly employs, or with due diligence should have known that licensee was employing,

an entertainer who does not have a permit. The licensee knowingly provides, or with the exercise of due diligence should have known the he/she was providing, space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. The licensee sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises. The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, the licensee's employee, who is on the premises furthering the business of the licensee, from selling, furnishing, giving, displaying, or causing to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, an entertainer to sell, furnish, give, display, or cause to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises;

6. The licensee knowingly denies, or thorough the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent,

his/her employee, who is on the premises furthering the business of the licensee, to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent an entertainer to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The attempted transfer of a license or any interest in a license;

8. If an application for a license or a renewal of a license was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license shall be revoked on the effective date of the court's judgement.

9. The licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54.

A continuing violation shall mean more than two judgements from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on

the determination that the violation has been continuing until such time as the judgment of the board is reversed.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54 that the licensee did not know, or through the exercise of due diligence could not have known that his/her employees' acts or an entertainer's acts would violate Chapter 6.54. If the licensee knew or should have known that his/her employees' acts or an entertainer's acts were violating any subsection of Chapter 6.54, the licensee may still affirmatively prove as a defense to the violation that the licensee was powerless to prevent the continuing unsafe or unsanitary condition.

10. Continuous Violations of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. Continuous violations shall mean that the licensee had more than two judgements entered against him/her for violating Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four month period, not including periods of suspension. The fact that the trial court's judgement is being appealed shall have no effect on the revocation until such time as the judgement of the trial court is reversed.

B. The board shall either fine, suspend or fine and suspend a license for any of the following reasons, that are not sufficient grounds for revocation:

1. The licensee fails to maintain the licensed premises in a sanitary or safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 724.030.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54, Tennessee Code

Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 that he/she did not know, or through the exercise of due diligence could not have known of his/her employee's acts or omissions or an entertainer's act or omissions. If the licensee knew or should have known that his/her employee or an entertainer was violating any such subsection of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030, the licensee may still affirmatively prove as a defense to the alleged violation that he/she was powerless to prevent the unsafe or unsanitary condition.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the licensee shall either be fined five hundred dollars or his/her license shall be suspended for a period no less than five days and no longer than thirty days or the licensee shall be both fined five hundred dollars and his or her license suspended for a period of not less than five days and no longer than thirty days.

3. Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the license shall be suspended no less than thirty-one days and no longer than ninety days.

A second violation of Chapter 6.54, shall mean a prior judgement from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the

board's judgment is being appealed shall have no affect on the determination that the violation occurred previously until such time as the judgment of the board is reversed.

A second violation of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 shall mean a judgment from a trial court that the license violated Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. The fact that a trial court's judgment is being appealed shall have no affect on the suspension and the judgment shall be treated as a violation until such time as the judgment of the trial court is reversed.

C. The board shall revoke a permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The permittee has become ineligible to obtain a permit under Section 6.54.080A;

3. Any cost or fee required to be paid by this chapter is not paid;

4. The permittee provides sexually oriented entertainment on the premises of an operator who he/she knows, or with the exercise of due diligence should have known, does not have a license;

5. The permittee knowingly, or with the exercise of due diligence should have known that he/she, sells,

furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the premises;

6. The permittee knowingly denies, or through the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The permittee attempted to transfer his/her permit or any interest in his/her permit to someone else;

8. The application for a permit or the application for the renewal of a permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits;

9. The permittee repeatedly fails to comply with the provisions of Chapter 6.54. Repeatedly fails to comply shall mean that the permittee has been found by the board to have violated Chapter 6.54 more than twice within a period of twenty-four months not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the permittee has repeatedly failed to comply until such time as the judgment of the board is reversed.

D. The board shall suspend a permit for any of the following reasons that are not grounds for revocation:

1. The permittee violates Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permittee shall either be fined five hundred dollars or his or her permit shall be suspended for a period no less than five days and no longer than thirty days or the permittee shall be both fined five hundred dollars and his or her permit suspended for a period of no less than five days and no longer than thirty days.

Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permit shall he suspended no less than thirty-one days and no longer than ninety days.

E. The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer five days' written notice of the alleged violation(s) against him/her. In such cases the charges shall be specific and in writing except under Section 6.54.150(A)(7), (8) and Section 6.54.150(C)(7), (8) of this chapter.

2. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting. The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may present evidence bearing upon the question of suspension/revocation.

3. If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. Failing to appear before the board will not preclude the licensee's/permittee's right to appeal any revocation/suspension to the chancery court of Davidson County.

4. If the licensee/permittee requests a hearing, the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held.

5. Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

6. The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of Davidson County by the licensee/permittee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within seven days from the grant of the writ of certiorari.

F. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one year from the date of revocation. (Amdt. 1 §§ 11-13 with Ord. 99-1503 § 88, 1999)

6.54.160 Penalties and prosecutions.

A. Any individual, partnership or corporation violating any of the provisions of this chapter shall be subject to any of the following penalties:

1. Five hundred dollars for each offense; and/or

2. A suspension of any license/permit for a specified period of time for each offense listed in Section 6.54.150B or D; or

3. Revocation of any license/permit for any conduct listed in Section 6.54.150A or C.

B. The penalty of suspension may not be combined with revocation. A fine alone can be a penalty or it may be combined with a suspension.

C. Each violation of this chapter shall be considered a separate offense and any continuing violation shall be considered a separate offense for each day of the violation. (Ord. 99-1503 §§ 89, 90, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.170 Invalidity of part.

Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

Department of State

To all to whom these Presents shall come, Greeting:

I, Riley C. Darnell, Secretary of State of the State of Tennessee, do hereby certify that the annexed is a true copy of

PUBLIC CHAPTER NO. 794

HOUSE BILL NO. 2926

PUBLIC ACTS OF 1998

the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I have hereunto subscribed my Official Signature and by order of the Governor affixed the Great Seal of the State of Tennessee at the Department in the City of Nashville, this 23rd *day of* April, *A.D. 1998*

/s/ Riley C. Darnell

PUBLIC CHAPTER NO. 794

HOUSE BILL NO. 2926

By Representatives Robinson, Buck

Substituted for: Senate Bill No. 2634

By Senator Haynes

AN ACT to amend Tennessee Code Annotated, Section 27-9-111, relative to judicial review of certain final orders or judgments of a board or commission by requiring the hearing and adjudication of the cases within a specified period.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 27-9-111, is amended by adding the following language as a new, appropriately designated subsection:

> ( ) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven (7) days of the grant of the writ of certiorari.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

HOUSE BILL NO. 2926

PASSED: APRIL 9, 1998

/s/ Jimmy Naifeh
JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

/s/ John S. Wilder
JOHN S. WILDER
SPEAKER OF THE SENATE

APPROVED this 23rd day of April 1998

/s/ Don Sundquist
DON SUNDQUIST,
GOVERNOR

03-6521

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DÉJÀ VU OF NASHVILLE, INC., a Tennessee corporation; JERRY C. PENDERGRASS, *et al.*

Plaintiffs-Appellees.

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Defendant-Appellant.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PETITION FOR REHEARING AND REHEARING *EN BANC* OF DEFENDANT/APPELLANT THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

JAMES L. CHARLES
Associate Director of Law

FRANCIS H. YOUNG
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Counsel for Appellant

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the Unites States Supreme Court: *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992); and *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). In addition, on the exceptionally important question of whether "special circumstances" exist which would make a sizable award of attorneys' fees to plaintiffs unjust, the panel decision conflicts with the Second Circuit's decision in *New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998).

/s/ Francis H. Young
Francis H. Young
Attorney for Defendant/
Appellant
The Metropolitan
Government of Nashville
and Davidson County

INTRODUCTION

This Petition for Rehearing and Suggestion for Rehearing *En Banc* follows the issuance of an opinion on August 31, 2005 (recommended for publication) affirming the trial court's award of attorneys' fees and costs to plaintiffs in the amount of $536,535.22.

The points or questions raised in this Petition are:

1. Do "special circumstances" exist which make the award of attorneys' fees and costs to plaintiffs unjust, as a result of the Supreme Court's decision in *Z.J. Gifts*?

2. Even if the Court determines that Déjà vu[1] is the "prevailing party" for purposes of the first injunction, is an award of approximately $460,000 in attorneys' fees justified for appealing the first injunction and litigating the second injunction, on which Déjà vu's only meaningful success was in having the superfluous term "sexually oriented" severed from Chapter 6.54?

PURPOSE OF PETITION

Very respectfully, the Metropolitan Government believes that the panel misapplied *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992); and *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). In addition, the finding that "special circumstances" did not exist in this case conflicts with *New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998).

The purpose of this petition is to seek a ruling that the award of attorneys' fees and costs was not warranted. Alternatively, the Metropolitan Government urges the Court to find that the award of approximately $460,000 of attorneys' fees and costs in incurred in appealing the dissolution of the first injunction and in litigating the second injunction (which solely resulted in the superfluous term "sexually oriented" being severed from the ordinance), to be unjust.

[1] For the sake of convenience, plaintiffs are collectively referred to herein as "Déjà vu."

1. The panel decision conflicts with *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992); and *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Even if Déjà vu is considered a "prevailing party" under *Farrar, supra*, the special circumstances of this case make any attorneys' fee award unjust. *Hensley, supra*, at 429.

The "special circumstance" at issue is the Supreme Court's June 7, 2004 opinion in *Z.J. Gifts, supra*. In *Z.J.Gifts*, the Supreme Court clarified what the law is and has been regarding "prompt judicial review." *Z.J.Gifts*' central holding is that ordinary state review procedures provide constitutionally adequate "prompt judicial review" of local governments' decisions to deny licenses for adult businesses. *Id.* at 782-84. The Court stated:

> In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally left for case-by-case determination rather than a facial challenge. *Z.J. Gifts*, at 781-82.

The Supreme Court continued:

> First, ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, where necessary, courts may arrange their schedules to 'accelerate' proceedings. (Citation omitted). And higher courts may quickly review adverse lower court decisions. (Citation omitted).

> Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. *Id.* at 782.

In marked contrast, in its opinion on the merits of this case, this Court held:

> Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim as required by *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)]. *Déjà vu of Nashville,Inc. v. Metropolitan Government*, 274 F.3d 377, 401 (6th Cir. 2001).

This Court then cited with disapproval to the affidavit from the Clerk and Master of the Davidson County Chancery Court which states, in part:

> "generally, our office processes all petitions for a writ of *certiorari* . . . within two days of the filing of the petition." This anecdotal affidavit, however, is insufficient to establish that aggrieved applicants are guaranteed prompt judicial review. *Id.*, at 402.

Respectfully, the Clerk and Master's affidavit is exactly the proof of "ordinary court procedural rules and practices" which the Supreme Court in *Z.J.Gifts* found to satisfactorily guard against "delay-induced First Amendment harm," yet this Court found it insufficient. As noted by the Supreme Court in *Z.J.Gifts*, there was also no evidence in that case of "any special Colorado court-related problems [regarding such delay-induced First Amendment

harm]." *Id.* at 782. The same is true of the instant case. Whether any such problems ever actually arise are "matter[s] normally fit for case by case determination, rather than a facial challenge." *Id.*

Very respectfully, the panel majority is mistaken in its reliance on the 2002 amendment to T.C.A. 27-9-111(e) as determinative in defeating a claim of "special circumstances." Slip op. at 6, n. 3. As a result of *Z.J. Gifts*, in which the Supreme Court clarified what the law of "prompt judicial review" is and has been, the 2002 amendment to T.C.A. § 27-9-111(e) was not needed in the first place. That amendment, in which the phrase "shall immediately grant the writ of certiorari" was added to the first sentence of subsection (e), was unnecessary to provide the type of "prompt judicial review" which *Z.J. Gifts* found constitutionally permissible. (*See* Compiler's Notes to T.C.A. § 27-9-111). The fact is that the Metropolitan Government sought an amendment (based on this Court's ruling on the merits of the case) which it did not need to do, under *Z.J. Gifts*.

Respectfully, the Metropolitan Government is not asking the Court to create a "revisionist history" of this case. While revisiting this Court's decision on the merits of this case is beyond the scope of this attorneys' fees dispute, the Court can, and should, take cognizance of the Supreme Court's pronouncements which clarify what the law is and has been, in matters relevant to the case. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993); See also *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting).

The Supreme Court has made such a pronouncement in *Z.J. Gifts* which directly applies to "prompt judicial

review," the only substantive ground in this case upon which Déjà vu prevailed. Now that the Supreme Court has made clear what the law is governing "prompt judicial review," it is apparent that the 2002 amendment to T.C.A. § 27-9-111(e) was unnecessary.

The panel majority cites to the 2002 amendment of this statute as the impediment to a finding of "special circumstances." Slip op. at 6, n. 3. Since the 2002 amendment has now been shown to be unnecessary it is unjust to rely on it to preclude a finding of "special circumstances" under *Hensley*.

Respectfully, the panel majority's decision that "special circumstances" do not exist in this case contradicts the Second Circuit's holding in *New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998). The Second Circuit anticipated the exact scenario which has come to pass in this case – a final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiff prevailed. *Id.* The Second Circuit noted the unjust result which would obtain if parties are awarded attorneys' fees when they would no longer be entitled to prevail on their theory, if the case were to be decided today. *Id.*

Finally, the panel majority noted that the Metropolitan Government at one time advocated a view that only prompt judicial "access" was necessary, yet the Supreme Court in *Z.J. Gifts* held that a prompt judicial "decision" is required. Slip op. at 5. Respectfully, in light of the ultimate holding of *Z.J. Gifts*, that point is immaterial. While the law does require a "prompt judicial decision," the law also allows state court judges the latitude to ensure that such

decisions occur promptly, through customary state court rules and practices. *Z.J.Gifts*, at 782-84. An award of $536,535.22 in attorneys' fees and costs seems particularly unjust, since, under the Supreme Court's analysis in *Z.J.Gifts*, Chapter 6.54 provided prompt judicial review from its initial enactment.

2. Alternatively, the Metropolitan Government should not be assessed attorneys' fees incurred after the first injunction was lifted.

Assuming *arquendo* that the judicial review provisions of Chapter 6.54 did not pass constitutional muster when they were first enacted, the first set of amendments to Chapter 6.54 and the state writ of *certiorari* review statute (T.C.A. § 27-9-111(e)) brought the judicial review provisions into compliance under *Z.J. Gifts*.

As the Court may recall, Déjà vu's first injunction was based on the alleged lack of "prompt judicial review." (*See* the Trial Court's Memorandum granting the first injunction, Apx. 72-89). After this injunction was entered, Chapter 6.54 was amended, as was the state writ of *certiorari* review statute. The Metropolitan Government then moved for dissolution of the injunction, which the Trial Court granted. (*See* the Trial Court's Memorandum granting the motion to dissolve the injunction, Apx. 108-121).

As is clear from the Trial Court's Memorandum dissolving the first injunction, the amended Chapter 6.54 eliminated the Court's concerns regarding the timeliness of administrative decisions whether to grant or deny permits or licenses. Apx. at 115. The Court also noted that the amended writ of *certiorari* statute, T.C.A. § 27-9-111(e), addressed the Court's concerns regarding the issuance of

an opinion within a mandated period of time, by requiring that that all First Amendment cases be heard and decided by a state trial court within 40 days. Apx. 115-116.[2]

As a result, at the time the Court dissolved the first injunction (December 3, 1998), Chapter 6.54 passed constitutional muster. True, this Court reversed the District Judge on this point in the opinion on the merits (274 F.3d 377, at 402-03), which was decided on December 6, 2001. However, on June 7, 2004, the Supreme Court would clarify what the law on "prompt judicial review" is, and what it has been. Under *Z.J. Gifts*, Chapter 6.54 was constitutional from the date of the dissolution of the first injunction.

This makes such a significant award of attorneys' fees in this case so troubling. Assume *arquendo* that the Metropolitan Government owes Déjà vu attorneys' fees for the litigation of the first injunction, which was based on the alleged lack of prompt judicial review. However, from the point that injunction was dissolved, under the *Z.J.Gifts* analysis, the "prompt judicial review" procedures of Chapter 6.54 have been constitutional. Thus, the attorneys' fee generated by Déjà vu in appealing the dissolution of the first injunction, and in litigating the second injunction at the trial an appellate levels was for work which was remarkably unsuccessful. The end result of the entire litigation of the second injunction was a determination that the superfluous term "sexually oriented" should be

[2] The Trial Court here refers to the 1998 amendment to T.C.A. § 27-9-111 which added subsection (e). A copy of the 1998 amendment, Public Chapter 794, § 1, is attached hereto.

severed from the ordinance.[3] 274 F.3d at 389. Respectfully, the Court itself would have severed the term but for the additional problem created by its misapplication of the law on "prompt judicial review." *Id.* at 389, 403.

Respectfully, this Court's opinion on the merits of the "prompt judicial review" issue imposes requirements on the Metropolitan Government which the Supreme Court found unnecessary, based on *Z.J. Gifts.* True, this Court's decision on the merits was final when the Supreme Court decided *Z.J. Gifts* in 2004. However, as a result of *Z.J. Gifts*, now this Court has an opportunity to work substantial justice in this case by declining to award a significant amount of attorneys' fees and costs ($464,429.99) which were incurred due to this Court's misapplication of the law on "prompt judicial review" in the opinion on the merits. 274 F.3d 402-03.

Respectfully, the Metropolitan Government is not asking the Court to create "revisionist history." Slip op. at 6. The Metropolitan Government only seeks a re-apportionment of fees under the law which presently governs the merits of a "prompt judicial review" decision. Now that the Supreme Court has clarified the meaning of "prompt judicial review," it is unjust to award Déjà vu such a significant amount of attorneys' fees and costs to which it would not be entitled, were the case to be decided today.

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[3] Plaintiffs' counsel sought $72,105.23 in attorneys' fees and costs incurred in the trial court to obtain the first injunction. See Apx. at 818 and 864. The rest of the $536,535.22 award ($464,429.99) was for the appeal of the dissolution of the "prompt judicial review" injunction (the first injunction) and for litigating the entire second injunction at the trial and appellate levels.

For the foregoing reasons, the Metropolitan Government respectfully requests *en banc* review, or alternatively a panel rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U. S. Mail, postage prepaid, to H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906 this 13th of September, 2005.

/s/ Francis H. Young
Francis H. Young

99-5071

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DÉJÀ VU OF NASHVILLE, INC., a Tennessee Corporation MICHAEL RUCKER, individually; MICHAEL BUTLER, Individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, Individually; JERRY C. PENDERGRASS; THE 822 CORPORATION; 421 CORPORATION,

Plaintiffs/Appellants,

CAROUSEL AMUSEMENT CENTER, INC., a Tennessee Corporation,

Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMETT TURNER, Chief of Police of the Metropolitan Police Department,

Defendants/Appellees.

FINAL BRIEF OF DEFENDANTS/APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police, are not required to make disclosures set forth in Sixth Circuit Rule 26.1. Chief Turner is sued only in his official capacity, which is the equivalent of a suit against the Metropolitan Government itself. The Metropolitan Government is a political subdivision of the State of Tennessee.

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Chattanooga City Code, § 11-431, 432 7

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STATEMENT REGARDING ORAL ARGUMENT

Defendants do not believe oral argument would assist the Court in understanding the issues presented in this limited interlocutory appeal and Defendants therefore waive oral argument.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Now that all corporate plaintiffs' businesses which have applied for licenses have been granted licenses, do these plaintiffs still have standing to challenge the procedural requirements of the ordinance?

II. Is the entertainers' appeal from the dissolution of the first preliminary injunction ripe?

III. Does the ordinance at issue provide for prompt judicial review in the event of an adverse administrative decision?

STATEMENT OF THE CASE

Defendants agree, for the most part, with Plaintiffs' Statement of the Case and have only two additions.

Plaintiffs (Déjà vu of Nashville Inc., Merony Entertainment, Inc. (operating Ken's Gold Club and The Pleasure Palace Inc.), 421 Corporation (operating the Purple Onion I, Purple Onion II, and Madam X), 822 Corporation (operating Metro News)) all received sexually oriented business licenses from the Sexually Oriented Business Licensing Board (hereinafter "Board") on May 26, 1999. All of the businesses affiliated with the corporate plaintiffs which have applied for a license have received one.

Mr. Pendergrass was convicted of the misdemeanor, obscenity, May 22, 1997, in Chattanooga. The ordinance bars persons who have been convicted of a misdemeanor crime of a sexual nature from holding a license for two years from the date of conviction. Nashville, Tenn., Metropolitan Code §6.54.050(B)(2) 1999. Since Mr. Pendergrass' misdemeanor conviction is now more than two years old it is no longer a bar to obtaining a sexually oriented business license under this ordinance. In fact, Metro News, the sexually oriented business affiliated with Mr. Pendergrass, has already been granted a sexually oriented business license, as set forth above.

STATEMENT OF FACTS

Defendants agree, for the most part, with Plaintiffs' Statement of Facts and have only two additions.

Defendants have contested throughout this litigation plaintiffs' assertion that the entertainment and sexually explicit materials they provide constitute protected "speech" and the assertion that the entertainment and sexually explicit materials provided by plaintiffs are "non-obscene."

Should an application (for either a license or a permit) be denied or should a license or permit holder have his/her license/permit suspended or revoked, the applicant may have an administrative hearing before the Board. "When an application is denied, the applicant has the right to request a hearing within five days of the board's notification." Nashville, Tenn., Metropolitan Code §6.54.040(E)(1) 1999.

Alternatively, the applicant may forgo the administrative hearing and proceed immediately to court.

> [M]etropolitan government shall file the record of all proceedings with the court within ten days from the date the Metropolitan Government was served with a petition for a writ of certiorari. Nashville, Tenn., Metropolitan Code §6.54.040(E)(2) 1999.

The ordinance does not limit an applicant's avenues of appeal to the courts.

SUMMARY OF ARGUMENT

The corporate plaintiffs no longer have standing to challenge the procedure used to apply for licenses in accordance with this Court's ruling in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) because all the businesses affiliated with the corporate plaintiffs which have applied for licenses have obtained them. Further, the entertainers' appeal from the dissolution of the first preliminary injunction is not yet ripe because the Metropolitan Government is bound by an Agreed Order not to enforce the ordinance at issue against the entertainers until after the trial court rules on the plaintiffs' second motion for a preliminary injunction.

The dissolution of the injunction by the district court was appropriate because the plaintiffs can no longer satisfy the requirements for an injunction, specifically, success on the merits. The dissolution of the injunction by the district court was appropriate because the amendments to the ordinance and to the Tennessee statute governing certiorari review (Tenn. Code Ann. § 27-9-111) (Supp. 1998) provide for maintenance of the status quo and prompt judicial review.[1] Prompt judicial review is maintained both by the statute and by the ordinance itself. The statute provides for a decision on the merits within forty (40) days from the granting of the writ of certiorari and the ordinance itself provides that "If the court fails to rule within forty days of the filing of an appeal, a license shall issue." Nashville, Tenn., Metropolitan Code §6.54.040(E)(3) 1999. Therefore, the decision of the district court dissolving the injunction should be upheld.

Plaintiffs' argument that the certiorari process itself fails to provide an appropriate level of judicial review has no merit.

ARGUMENT

I. The Corporate Plaintiffs Do Not Have Standing to Challenge the Procedure To Obtain A License.

This Court has already held in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997), that sexually oriented businesses which have obtained a license to operate do not have standing to object to the licensing

[1] Since plaintiffs do not allege that the status quo is not maintained by the ordinance, this issue will not be discussed further.

procedures. In *DLS, Inc.*, This Court was faced with review of two aspects of the ordinance's licensing scheme: 1) the procedural system prescribed by the ordinance for the award or denial of licenses and 2) the substantive standards for the award of licenses or permits under Chattanooga's City Code. *Id.* at 413. In its decision this Court stated,

> We reach a result opposite to that of the district court; we believe that the plaintiffs have standing to challenge the substantive criteria for the issuance of licenses or permits, but lack standing to challenge the licensing scheme. Only DLS and its owner, Ann Martin, could have standing to challenge the license procedures . . . Both DLS and Martin, however, already have succeeded in obtaining a license under §§ 11-424 and 11-425. If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses under §§ 11-431 or 11-432. Therefore, they cannot demonstrate that their challenge to the licensing procedures satisfies the three core requirements for standing under Article III:
>
> > (1) "injury in fact," by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;
> >
> > (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to challenged action of the defendant, and has not resulted from the independent action of some third party not before the court;

> and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.
>
> *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1074 (6th Cir.1994), quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 2302, 124 L.Ed.2d 586 (1993). Any modification to the licensing scheme would have no effect on the potential threat that DLS or Martin face under renewal or revocation proceedings.

Id. at 413-14. Similar to *DLS, Inc.*, all businesses that have applied for a license[2] have received one – Purple Onion I, Purple Onion II, Madam X, Metro News, Ken's Gold Club, Déjà vu and Pleasure Palace. *See* R. 157, Notice of Filing dated June 7, 1999, Appx. at 343.

Unlike the plaintiffs in *DLS, Inc.*, neither the business plaintiffs nor the entertainer plaintiffs have placed before this Court the issue of whether or not a prior restraint exists as to renewals or revocations. Plaintiffs' first motion for a preliminary injunction rested solely on the issue of prior restraint as to the initial application process for a license/permit. R. 2 and 3, Plaintiffs' Motion for a Preliminary Injunction, Appx. at 123 and 129.

Even assuming that issue was before this court, the safeguards enunciated by the Supreme Court in *FW/PBS*,

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[2] Carousel Amusement Center Inc. has not applied for a license, and is not an appellant herein.

Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) do not apply to license revocations because a revocation is not a prior restraint. It is not the restraint of expressive conduct[3] before it occurs. Revocation is the remedy for behavior which violates the ordinance after it has occurred. Therefore, even assuming license revocations affect speech, prior restraint analysis would not be appropriate because the remedy of revocation is implemented after the activity, not prior to it.

Further, licensees do not face the specter of losing their license because they have engaged in expressive conduct. Because license revocations do not involve the prior restraint of speech, the constitutional standard to be applied to license revocations is that enunciated by the Supreme Court in *Arcara v. Cloud Books*, Inc., 478 U.S. 697, 706, 106 S.Ct. 3172, 3177-78, 92 L.Ed.2d 568 (1986). (The Court did not advocate any special or increased standard of review for ordinances which punish conduct after the conduct has occurred.) *Also see, O'Connor v. City and County of Denver*, 894 F.2d 1210, 1216-19 (10th Cir. 1990), reh. den. March 12, 1990 (Relying on *Arcara*, the Tenth Circuit held that closing an adult entertainment business for criminal activity does not involve the First Amendment, and that the *FW/PBS Inc.* protections only apply when the government regulates content).

It is the alleged lack of procedural safeguards (prompt judicial review and its scope) which is the sum and substance of this appeal from the district court's dissolution of the injunction. Therefore, this appeal on behalf of the

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[3] For purposes of this brief only, defendants will assume plaintiffs' conduct constitutes expression.

corporate plaintiffs', whose business entities now hold licenses, must fail for lack of standing. Only the plaintiff entertainers (Dawn Pierce and Elizabeth Martz) have standing to challenge the constitutionality of the procedure under which they would be granted permits.

II. The Entertainers' Appeal From the Dissolution of the First Preliminary Injunction Is Not Yet Ripe.

The requirement of ripeness arose out of the concept of justicability based on Article III of the United States Constitution. *See Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C.Cir.1982) (Bork, J., concurring), *cert. denied*, 464 U.S. 823, 104 S.Ct. 91, 78 L.Ed.2d 98 (1983). Ripeness requires that the "injury in fact be certainly impending." *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996) (citations omitted). Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01, 103 S.Ct. 1713, 1720-21, 75 L.Ed.2d 752 (1983).

Within the context of the First Amendment, the Supreme Court has enunciated concerns that justify a lessening of the usual requirements for a pre-enforcement challenge to a statute with criminal penalties. *Secretary of*

State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956, 104 S.Ct. 2839, 2846-47, 81 L.Ed.2d 786 (1984). The harm alleged in First Amendment cases is the "chilling effect" on the constitutionally protected right to free expression, which, the Supreme Court has stated, is "of transcendent value to all society." *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965). A statute prohibiting activity protected by the First Amendment leads to "self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988); *Dombrowski*, 380 U.S. at 486-87, 85 S.Ct. at 1120-22 (the practical value of the First Amendment right may be destroyed if not vindicated before trial). The ripeness inquiry to pre-enforcement challenges in First Amendment cases usually focuses on how imminent the threat of prosecution is and whether the alleged chill on First Amendment rights is concrete and credible, and not merely "imaginary or speculative". *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1289, 1215, 39 L.Ed.2d 505 (1974). Parties not yet affected by the actual enforcement of the statute are allowed to challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to "'chill' the exercise of free speech and expression," a constitutionally protected right. *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir.1995) (citations omitted).

On January 26, 1999 Judge Trauger entered an agreed order under which the defendants agreed that entertainers had five days from the date of entry of the trial court's ruling on plaintiffs' motion for a second preliminary injunction, among other things, in which to apply

for a permit.[4] R. 115, Agreed Order, Appx. at 292. Plaintiffs' motion for a second preliminary injunction was heard by Judge Higgins on April 13-15, 1999, as a full-blown evidentiary hearing. As of the date of this filing Judge Higgins has not issued a ruling on plaintiffs motion for a second preliminary injunction. Therefore, the entertainers do not face enforcement of the ordinance and the dissolution of the first preliminary injunction does not affect them. Any alleged harm or chill on the expression of the entertainer plaintiffs is not imminent because of the Agreed Order. Since any alleged harm is not imminent, this appeal is not ripe as to the plaintiff entertainers, Dawn Pierce and Elizabeth Martz.

In addition, the plaintiff entertainers both allege that they are currently entertainers in Nashville who engage in sexually oriented entertainment. R. 1, Déjà vu Complaint para. 10-11, Appx. at 22. Assuming the trial court were to deny the plaintiffs' second motion for a preliminary injunction in its entirety and the ordinance would then be enforced against entertainers, current entertainers are permitted to continue entertaining, even if their application for a permit is denied, until such denial of a permit is upheld by a court.

> For any current entertainer, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court

[4] Plaintiffs' motion for a second preliminary injunction raises a vast array of challenges to the ordinance. In contrast, the instant appeal arises from the dissolution of plaintiffs' first preliminary injunction, which was grounded solely on the issue of prompt judicial review.

> after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8). Adverse decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

Nashville, Tenn., Metropolitan Code § 6.54.070(D) (3) 1999. The plaintiff entertainers do not suffer the threat of imminent harm in the event the ordinance is enforced and their applications are denied. It is in the interest of judicial economy to await the decision of the trial court on plaintiffs' motion for a second preliminary injunction. If and when Judge Higgins' ruling on that motion is appealed, then it makes sense for this Court to hear both matters together instead of these piecemeal appeals.

III. The Ordinance Fulfills the Requirements of *FW/PBS*.

A. Judicial Review Under the Common Law Writ of Certiorari Is Prompt.

The Supreme Court enunciated the following standards for reviewing a licensing/permitting code:

> In *Freedman [v. State of Maryland*, 85 S.Ct. 734, 380 U.S. 51, 13 L.Ed.2d 649 (1965)], we determined that the following three procedural safeguards were necessary to ensure expeditious decision-making by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief

> period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman, supra*, at 58-60, 85 S.Ct., at 738-740. Although we struck the licensing provision in *Riley v. National Federation of Blind of N.C., Inc., supra*, on the ground that it did not provide adequate procedural safeguards, we did not address the proper scope of procedural safeguards with respect to a licensing scheme. Because the licensing scheme at issue in these cases does not present the grave "dangers of a censorship system," *Freedman, supra*, at 58, 85 S.Ct., at 738-39, we conclude that the full procedural protections set forth in *Freedman* are not required.

FW/PBS Inc., 493 U.S. at 227-28, 110 S.Ct, at 606 citing *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781 (1988). The Court went on to say,

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of

> prompt judicial review in the event that the license is erroneously denied.

Id. at 228, 110 S.Ct. at 606.

1. Writs of Certiorari.

Article VI, Section 10 of the Tennessee Constitution provides that:

> The Judges or Justices of the Inferior Courts of Law and Equity shall have the power in all civil cases, to issue writs of certiorari to remove any cause or the transcript of the record thereof, from any inferior jurisdiction, into such court of law, on sufficient cause, supported by oath or affirmation.

Tenn. Const., art. VI, §10. Certiorari at common law performed the function of review and supervision of the proceedings of inferior boards and tribunals by a superior tribunal, not taking the place of appeal or writ of error, but bringing up the entire record in order to make a determination whether there has been an absence or excess of jurisdiction, or a failure to proceed according to the essential requirements of the law. *Conners v. City of Knoxville*, 136 Tenn. 428, 432, 189 S.W. 870, 871 (Tenn. 1916). In Tennessee, common law writs of certiorari are authorized by Tenn. Code Ann. § 27-8-101:

> The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not

> apply to actions governed by the Tennessee Rules of Appellate Procedure.

Tenn. Code Ann. §27-8-101 (Supp. 1998)

Plaintiffs argue that the words "or is acting illegally" are superfluous by arguing that they have the exact same meaning as "has exceeded the jurisdiction conferred". Appellant's Brief at 29. A statute must be construed so as to ascertain and give effect to the intent and purpose of the legislation, considering the statute as a whole and giving words their common and ordinary meaning. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980). The court should assume that the legislative body used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and purpose. *Anderson Fish & Oyster Co. v. Olds*, 197 Tenn. 604, 277 S.W.2d 344 (1955). *See also Crowe v. Ferguson*, 814 S.W.2d 721, 723 (Tenn. 1991) (To respond to the issue of whether the Tennessee Code prohibits persons who are unsuccessful candidates in a party primary from subsequently running in a non-partisan general election for a different office, the court looked to the rules of statutory construction.) The fact that the Tennessee Legislature put in both clauses, "exceeded the jurisdiction conferred, or is acting illegally", necessitates the conclusion that each clause has a meaning.

Plaintiffs try to distinguish *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978). Appellant's Brief at 19. However, the line of cases leading up to *Johnson* both define "illegal" and create an additional protection above and beyond the statutory authority of the courts to grant

the writ for "illegal action". According to *Johnson*, Tennessee courts will grant a writ if there is a procedural error or an error of law. *See State v. Odom*, 200 Tenn. 231, 292 S.W.2d 23 (1956). Based on the long line of cases discussing the concept of illegality and illegal action, *Johnson* held that the following additional circumstances warrant review under a common-law writ of certiorari:

1. Where the ruling of the inferior tribunal represents a fundamental illegality;

2. Where the ruling constitutes a failure to proceed according to the essential requirements of the law;

3. Where the ruling is tantamount to the denial to either party of a day in court;

4. Where the action of the judge was without legal authority;

5. Where the action of the judge constituted a plain and palpable abuse of discretion;

6. Where either party has lost a right or interest that may never be recaptured.

569 S.W.2d at 815 (citations omitted).

In *Johnson*, the Tennessee Supreme Court closely examined common law writs of certiorari including the writ's history and use in Tennessee. The court stated that the general rule in granting a writ is to "ascertain the validity of proceedings before a court of justice, either on the charge of their invalidity, because the essential forms of the law have not been observed, or on that of the want of jurisdiction in the court entertaining them." *Id.* at 812 (citing *State ex rel. McMorrow v. Hunt*, 137 Tenn. 243, 250, 192 S.W. 931, 933 (1917) (County clerk was suspended

from office by the Chancery Court and appealed by writ of certiorari to the Tennessee Supreme Court)).

The court then went on to say the courts of Tennessee have not hesitated to make exceptions to the general rule, one of which is the "fundamental illegality rule" exception. *Id.* The *Johnson* court lists numerous cases where the fundamental illegality exception was involved. Specifically *Johnson* discusses *State v. Odom*, 200 Tenn. 231, 292 S.W.2d 23 (1956), in which the trial judge reduced a jury conviction from first degree murder to murder in the second degree, overruled the state's motion for a new trial and denied the state's prayer for an appeal. The state petitioned for the common law writ. In *Odom*, the trial judge had not "exceeded the jurisdiction conferred" and was not "acting 'illegally' in the usual sense of the word." *Johnson*, 569 S.W.2d at 812-13. The trial judge "merely committed a procedural error, an error of law." *Id.* at 813. Nevertheless the court granted the writ, holding "this action in reducing the degree of unlawful homicide from that found by the jury is Illegal." *Id.* (citing 200 Tenn. at 235, 292 S.W.2d at 25).

In *Taylor v. Continental Tennessee Lines, Inc.*, 204 Tenn. 556, 560, 322 S.W.2d 425, 427 (1959), the court granted the common law writ, holding that the refusal of the trial judge to permit the filing of a plea in abatement "was contrary to law and in legal effect amounted to a denial to the defendants of their day in court." 204 Tenn. at 560, 322 S.W.2d at 426.

Most importantly in *Whitwell v. State*, 520 S.W.2d 338 (Tenn. 1975), the Tennessee Supreme Court granted a common law writ, relying upon the "fundamental illegality" rule in order to bar a second trial in violation of the

defendant's constitutional protection against double jeopardy. *Johnson*, 569 S.W.2d at 812-13. In *Whitwell*, the trial court was not acting "illegally" nor was it acting in "excess of its jurisdiction." *Id.* at 813. "The court had ruled erroneously on a matter of law. It is just that simple." *Id.* Had Whitwell been convicted as a result of a second trial, he would have had a right to appeal; but, absent the court's grant of the common law writ, Whitwell had "no full, complete and adequate remedy". *Id.*

The Tennessee Court of Appeals said precisely this in *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn.App. 1994) Perm. Appeal Den. saying: "If the agency or board has reached its decision in a constitutional or lawful manner, then the decision would not be subject to judicial review." *Id.* at 873.

The Supreme Court of Tennessee has consistently held that unconstitutional action by a lower tribunal constitutes grounds to issue a petition for a writ of certiorari. *State v. Johnson*, 569 S.W.2d 808 (Tenn. 1978); *Whitwell v. State*, 520 S.W.2d 338 (Tenn.1975).

Plaintiffs suggest that the pleadings requirements of the petition for the writ is another reason why writs of certiorari do not satisfy the requirements of *FW/PBS, Inc.* The writ of certiorari process merely avoids the necessity for the respondent to move to dismiss the petition for failure to state a claim upon which relief can be granted under the writ. In a writ of certiorari proceeding, the court engages in the motion to dismiss process *sua sponte.* For example, in *Jasper Engine & Transmission Exch. v. Mills*, 911 S.W.2d 719 (Tenn. App. 1995) the petition merely recited a history of the case, the amount sued for, and the amount of the judgment entered by the trial court, and

asserted as grounds for certiorari a conclusory statement that "mutual mistakes have been made". *Id.* at 719. This was found to be insufficient to warrant issuance of a writ of certiorari. *Also see, GMAC v. Dennis*, 675 S.W.2d 489 (Tenn. Ct. App. 1984). (Neglect on the part of the petitioner is not a ground to grant a request for a writ of certiorari); *League Central Credit Union v. Mottern*, 660 S.W.2d 787 (Tenn. Ct. App. 1983) (The petitioner must be able to demonstrate that he, she or it is adversely affected by the decision of the inferior tribunal in order to be classified as an aggrieved person and therefore entitled to judicial review). The petition for a writ must be properly pled.

2. The Amendment to Tenn. Code Ann. § 27-9-111 Provides for a Decision On The Merits Within Forty (40) Days of the Writ of Certiorari Being Granted.

Tennessee Code Annotated § 27-9-111 addresses the briefing and hearing schedule used in processing a writ of certiorari. It is this section which has been amended by adding the following:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code

> Annotated, Section 27-9-109 within seven (7) days of the grant of the writ of certiorari.

Tenn. Code Ann. § 27-9-111 (Supp. 1998). In its Memorandum Opinion, the Court found that the prior version of Tenn. Code Ann. § 27-9-111 did not require the chancellor to issue an opinion within any mandated period of time. R. 22 and 23, Memorandum and Order, Appx. at 228 and 246. Tennessee Code § 27-9-111, as amended, now provides that all First Amendment cases will be heard and decided within forty (40) days from the grant of certiorari.

This time limit satisfies the requirements of *FW/PBS Inc.* and *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995) reh. den., reh. en banc den.

In *East Brooks Books, Inc.*, the Sixth Circuit stated: "Although the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible." 48 F.3d at 225. *See, e.g. Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 562, 95 S. Ct. 1239, 1248, 43 L. Ed. 2d 448. (1975) (a delay of more than five months was excessive).

The one case which discussed a specific number of days to provide judicial review is *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) rehrg. den. 403 U.S. 924 (1971). Mr. Milton Luros returned to the United States from Europe with 37 photographs. A customs agent, acting pursuant to the Tariff Act of 1930, 19 U.S.C.A. § 1305(a), seized the photographs as obscene material. 402 U.S. at 365-66, 91 S.Ct. at 1402-03. The Supreme Court analyzed *Thirty-Seven Photographs* under *Freedman*. 402 U.S. at 367, 91 S.Ct. at 1403 citing 380 U.S. 51, 58. *Thirty-Seven Photographs* was scrutinized under the more burdensome

Freedman test, as opposed to the test utilized in *FW/PBS, Inc.* and the other sexually oriented businesses licensing cases, since *Thirty-Seven Photographs* was not content neutral review, but clearly censorship. Though the federal statute stated that prompt judicial review was available, it did not set out a time limit in which that review had to occur. 402 U.S. at 368, 91 S. Ct. at 1404. The Court examined other cases and determined that sixty (60) days for the completion of judicial proceedings was sufficiently prompt to satisfy the demand of prompt judicial review and imposed it upon the statute. *Thirty-Seven (37) Photographs*, 402 U.S. at 374-75, 91 S. Ct. at 1407.

> [N]o undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305(a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court. 402 U.S. at 373-74, 91 S. Ct. at 1407.

B. Chapter 6.54, as Amended, Ensures the Grant of a License or Permit In the Event the Court Fails To Adjudicate The Matter Promptly.

Plaintiffs argue that there is no statutory requirement that a petition for a writ be granted or denied in a specific time period. The defendants do not merely rely on the

regular practice of the Chancery Courts of Davidson County to grant petitions for a writ in two (2) days or less. The defendants rely on the provisions of the ordinance at issue which provides that a license/permit will issue in forty (40) days if the court fails to rule. Nashville, Tenn., Metropolitan Code §6.54.040(E)(3) 1999.

> [I]f the court fails to rule within forty (40) days of the filing of an appeal,, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with 6.54.150(A)(10).

Even without the recent amendments to T.C.A § 27-9-111, on its face, Chapter 6.54 satisfies the requirement of prompt judicial review.

C. The Scope of Review Under A Common Law Writ of Certiorari Is Constitutionally Sufficient.

The common-law writ of certiorari is issued by a court so that it can inspect the proceedings of an inferior tribunal to determine whether it exceeded its jurisdiction or acted illegally. *Hoover Motor Express Co., Inc. v. Railroad and Public Utilities Commission*, 195 Tenn. 593, 261 S.W.2d 233 (Tenn. 1953). The court must review the evidence submitted to the inferior tribunal and determine by a preponderance of the evidence whether the inferior tribunal exceeded its jurisdiction or acted in an illegal, arbitrary or capricious manner. *Id.* at 235. In addition, a decision of an inferior tribunal that is not supported by material evidence is arbitrary and, thus, void. *Id.* at 238. Therefore, the trial court must review the record of the

inferior tribunal to determine if there is "*any* evidence of a material or substantial nature from which that body, by *reasoning from that evidence*, arrived at the conclusion of fact which is being reviewed." *Massey v. Shelby County Retirement Bd.*, 813 S.W.2d 462, 465 (Tenn. Ct. App. 1991) (emphasis in the original). *See also Houston v. Memphis and Shelby County Board of Adjustment*, 488 S.W.2d 387, 389 (Tenn. Ct. App. 1972) (the court granted variance appealed by nearby landowners through a writ of certiorari holding that there was no material evidence before the board demonstrating the applicant fulfilled the requirements to obtain a variance and therefore the decision was outside the board's jurisdiction); *Davison v. Carr*, 659 S.W.2d 361, 363-64 (Tenn. 1983) (City commissioner was removed and filed petition of certiorari in circuit court seeking review. The court held that: (1) the commissioner properly challenged board's action by way of petition of certiorari; (2) as common-law writ of certiorari properly issued, material evidence rule was applicable; and (3) there was no material evidence to support judgment of board of commissioners in removing commissioner from office).

Material evidence is such evidence that is "material to the question in controversy, which must necessarily enter into the consideration of the controversy and by itself, or in connection with the other evidence, be determinative of the case." *Knoxville Traction Co. v. Brown*, 115 Tenn. 323, 331, 89 S.W. 319, 321 (Tenn.1905); *Fuller v. Tennessee-Carolina Transportation Co.*, 63 Tenn. App. 330, 338, 471 S.W.2d 953, 956 (Tenn. Ct. App. 1970) (The court looked to the definition of "material evidence" to determine whether or not a directed verdict was appropriate.) Substantial evidence has been defined as such evidence as reasonable

minds might accept as adequate to support the conclusion of the inferior tribunal. *Rice Bottling Co. v. Humphries*, 213 Tenn. 8, 10, 372 S.W.2d 170, 172 (Tenn. 1963).

Additional evidence is limited to the question of whether the board or commission being reviewed exceeded its jurisdiction or acted fraudulently, arbitrarily, or illegally. *Hoover*, 261 S.W.3d 233, 238; *Hemontolor v. Wilson County Board of Zoning Appeals*, 883 S.W.2d 613, 618-19 (Tenn. Ct. App. 1994) (Trial court correctly excluded introduction of additional evidence that did not pertain to the question of whether the Board exceeded its jurisdiction or acted illegally, arbitrarily or capriciously.) The rules governing the admission of additional evidence under the common-law writ of certiorari have been summarized as follows:

> In summary, under the common-law writ of certiorari the court reviews only the essential legality of the administrative proceeding and conclusions of law or mixed conclusions of law and fact reached by the administrative agency. New evidence is admissible only on the issue of whether the administrative body exceeded its jurisdiction, or acted illegally, capriciously or arbitrarily. Agency conclusions of fact are accepted if there is material evidence in the agency record to support its conclusions. On this issue, there is no new evidence admitted and no re-weighing of the facts. The reviewing court is limited to vacating the finding and remanding the cause to the agency for the purpose of making a legally supportable finding of fact.

Cantrell, *Review of Administrative Decisions by Writ of Certiorari in Tennessee*, 4 Mem. St. U. L. Rev. 19 (1973).

Judge Nixon, in ruling on defendants' motion to dissolve the preliminary injunction found *Hoover, Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, (Tenn. Ct. App. 1996) convincing authority for the proposition that Tennessee courts treat allegations of unconstitutional administrative agency actions as reviewable under a writ of certiorari. In *Hoover Inc.*, the Board of Zoning Appeals denied Hoover Inc. a conditional use permit to operate a quarry. *Id.* at 902. The Tennessee Court of Appeals stated that "[a]n illegal, arbitrary, or fraudulent action could be any number of things. Examples include the following:

1. the failure 'to follow minimum standards of due process';
2. the misrepresentation or misapplication of a legal standard;
3. the making of a decision for 'ulterior motives'; or
4. the violation of a constitutional standard."

Hoover, 924 S.W.2d at 905, citing Cantrell, *supra* at 28-29. The court also held that the issue of whether an administrative body has acted illegally, arbitrarily or fraudulently is not limited to a determination of whether material evidence supported the administrative body's decision. *Hoover Inc.*, at 905. Clearly, Judge Nixon properly relied upon *Hoover* in holding that certiorari review in Tennessee complies with the constitutional requirement of prompt judicial review.

Plaintiffs attempt to rely on the language in *Freedman* for the proposition that the scope of review of the courts under a common law writ of certiorari is insufficient in the context of prompt judicial review. Appellant's Brief,

at 33-35. Plaintiffs' argument is unpersuasive for two reasons: 1) *Freedman* did not discuss the scope of review; and 2) the court in *Freedman* was discussing the burden of the government to bring the matter to the courts and the finality of the determination of the administrative decisionmaker. What the *Freedman* Court said was:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See *Bantam Books, Inc. v. Sullivan*, [372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)]; *A Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Marcus v. Search Warrant*, [367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961)]; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519, 82 S.Ct. 1432, 1453-1454, 8 L.Ed.2d 639 (1962). To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.

Freedman, 380 U.S. at 58-9, 85 S.Ct. at 739. A certiorari proceeding is adversarial.

The plaintiffs also erroneously rely on *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) and *Baby Tam & Co., Inc. v. Las*

Vegas, 154 F.3d 1097 (9th Cir. 1998). *Conrad*, like *Freedman*, was a censorship case and it did not involve a licensing ordinance. In *Conrad*, the board for the municipal auditorium in Chattanooga refused to allow Southeastern Promotions to bring a touring company performing the musical "Hair" to the city's municipal auditorium because the board decided, without ever seeing a performance of "Hair", that the production was not clean or healthful and would not be in the best interest of the community. *Conrad*, 420 U.S. at 48, 95 S.Ct. at 1242. The Court rightly reviewed this decision under the *Freedman* test as it clearly involved censorship. The Court never discussed the scope of review which would be appropriate under the *Freedman* test. The city's refusal to permit the production of "Hair" was found to be unconstitutional because it failed to provide for prompt judicial review, and the fact that at the hearing for the temporary injunction the burden of proof rested on Southeastern Promotions. *Conrad*, 420 U.S. at 561-62, 95 S.Ct. at 1248.

Baby Tam actually supports the position of the defendants, that the scope of review is sufficient. In *Baby Tam* the City of Las Vegas' ordinance was enjoined because it contained "no provision that a judicial hearing must be held or a decision must be rendered within a prescribed period of time." 154 F.3d at 1101. However, the Ninth Circuit went on to define the term "judicial review" saying, "The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless." *Id.* at 1101-02. There is no question that these two elements are present in a writ of certiorari proceeding in Tennessee. *See* Tenn. Code Ann. § 27-9-111.

Defendants have not found any case that has held that the scope of review provided by Tennessee's common law writ of certiorari does not provide the petitioners the process they would be due under the First and Fourteenth Amendments to the United States Constitution. The cases cited by the plaintiffs do not address the scope of review of a court when reviewing an administrative decision, but instead discuss the procedural requirements of the review.

Smith v. County of Los Angeles, 259 Cal.Rptr. 231, 211 Cal.App.3d 188 (Cal. Ct. App. 1989) is instructive. The plaintiff, Smith, was denied a conditional use permit for an adult cabaret. *Id.* at 232, 211 Cal.App.3d at 190. Smith appealed the Board of Supervisors' denial of his request for a conditional use permit. *Id.* The trial court denied Smith's petition for a writ of mandate to set aside the Board of Supervisors' denial, holding that the board's action was based upon substantial evidence. *Id.* at 232, 211 Cal.App.3d at 190-91. The board heard testimony, visited the site, and reviewed many letters from the community. The board found that the use would contribute to urban blight and diminish property values in the area. *Id.* at 235, 211 Cal.App.3d at 195.

Smith appealed to the trial court and then to the appellate court. Smith's argument to the appellate court was that the trial court should have exercised its independent judgment in reviewing the evidence since the matter "touches upon fundamental and vested rights to continue a constitutionally protected business." *Id.* at 236, 211 Cal.App.3d at 196-97 (citations omitted). The grant or denial of a conditional use permit by the board is an administrative or quasi-judicial act. *Id.* at 237, 211 Cal.App.3d at 198. Therefore, the petitioner must proceed using an administrative mandamus which only requires

the court to look to the administrative record to ascertain whether the agency has proceeded without or in excess of its jurisdiction, whether there was a fair hearing, or whether there was any prejudicial abuse of discretion. *Id.* The court's review is limited to a review of the record to determine whether the findings of the board support the decision, and whether the evidence in the record supports the findings, commonly referred to as the substantial evidence test. *Id.* The court may not consider evidence outside the administrative record and must deny the writ if there is any substantial evidence in the record to support the findings. *Id.* The appellate court found that the standard of review by the trial court was appropriate and sufficient[5]. *Id.* at 240, 211 Cal.App.3d at 200.

This limited scope of review is appropriate in the case at bar because of the extremely limited discretion of the Board. The Board must grant the applicant a license/permit if the applicant is at least eighteen years of age, has not been convicted of any crimes of a sexual nature, not included false information on the application[6] or had a similar license/permit revoked in the last year. Businesses cannot have been found to have violated the adult entertainment zoning code in the last year and if the business has booths, their construction must conform to the requirements in the ordinance. This is fact-finding within very limited parameters.

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[5] The appellate court based its decision on its belief that the constitutional right involved was a vested property right not a first amendment right. However, Smith's claim to have a "constitutionally protected business" seems to allude to more than just a vested property interest. *Id.* at 236, 211 Cal.App.3d at 196-97

[6] This requirement is limited to information the applicant knew or should have known was false at the time of the application.

In *Gasparo v. New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998), the court reviewed a concession scheme for newspaper stands which was replacing the city's licensing ordinance. The plaintiffs challenged the concession ordinance claiming, among other things, that the ordinance was unconstitutional under the First Amendment because it did not require a "prompt" decision on a permit application and that the procedures for judicial review were insufficient when the agency has denied a permit application. *Id.* at 210. In response the city argued that sufficient judicial review is provided by the availability of a proceeding pursuant to Article 78 of New York's Civil Procedure Law. *Id.* at 211.

An Article 78 proceeding is a form of action providing relief that was previously obtained by writs of certiorari, mandamus, and prohibition. *Id.* The court found that the Article 78 proceeding was virtually identical to the Illinois scheme which was reviewed by the Seventh Circuit in *Graff v. City of Chicago*, 9 F.3d 1309, (7th Cir. 1993). Under Illinois law, "[t]he appropriate method to review Chicago's administrative agency decisions is by the common law writ of certiorari." *Gasparo*, 16 F.Supp.2d at 211 citing *Graff*, 9 F.3d at 1325.

The *Gasparo* court found the concurring opinion of Judge Flaum in *Graff* convincing. *Id.* at 211. Judge Flaum reasoned that the *Freedman* procedural safeguards are only necessary when the board/administrator is making content-based decisions. *Id.* However, when the board is not making content-based decisions the *Freedman* procedural safeguards are unnecessary.

> Judge Flaum reasoned that extraordinary provisions for judicial review were mandated only where an administrator was exercising discretion

> to make content-based judgments about whether expressive materials were protected by the First Amendment. Where these kinds of content-based judgments are made, he wrote, "we wisely do not trust to administrative officials [such discretion] without the benefit of a watchful judicial eye." *Graff*, 9 F.3d at 1333 (Flaum, J., concurring). Judge Flaum explained, however, that extraordinary judicial review procedures were not needed when an administrator's job is merely "to make the kind of determinations for which they are especially suited; e.g. questions about city aesthetics, traffic flow or City Code violations." *Id.* Having decided that the permitting scheme in *Graff* entailed the evaluation of non-content-based criteria. Judge Flaum concluded that the ordinary procedures for judicial review were sufficient to satisfy the constitutional requirements. Judge Ripple also concurred for substantially the same reasons. See *id.* at 1335 (Ripple, J., concurring).

Gasparo, 16 F.Supp.2d at 212.

The court went on to say that under Chicago's scheme, the administrator's discretion is limited by objective criteria. *Id.* 212-13. Therefore, government officials are not engaging in the kind of content-based judgments about expressive material that were contemplated in *Freedman's* review of a movie censorship scheme[7]. *Id.* The court concluded that though licensing schemes that have the effect of imposing a prior restraint on speech must contain

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[7] The court also distinguished the Chicago concession scheme from administering an "adult establishment" ordinance. *Id.* at 213. Since the decisions made by the Board are strictly factual, not content-based, *Gasparo* remains persuasive authority on this issue.

standards to guide the licensor's discretion and must include time limits to ensure that a decision is made promptly, the requirement that the ordinance provide an explic.t mechanism for judicial review may not, for the reasons outlined by Judge Flaum in *Graff*, always be necessary. *Gasparo*, 16 F.Supp.2d at 212-13. "Specifically, such special provisions may not be necessary where, as here, an ordinance is content-neutral, the licensor's discretion is not "unfettered," the statute requires that the request for a license be acted on promptly, and the administrative determination is based on criteria that are within the administrator's normal expertise." *Id.*

This Court has, however, rejected the Seventh Circuit's analysis of the prompt judicial review requirement set forth in *Graff. East Brooks Books Inc.*, 48 F.3d at 224-25. This Circuit requires not just access to the courts, but a prompt judicial decision, in order for a local ordinance to comply with the "prompt judicial review" requirement. However, the issue regarding the sufficiency of the appropriate scope of judicial review is a completely separate issue. *Gasparo's* (and *Graff's*) analysis of the required scope of review for the types of decisions made by the Board is sound reasoning and it is persuasive. Chapter 6.54 of the Metropolitan Code contains very specific limits on the decisions made by the Board all of which are factually based decisions. The scope of the Tennessee certiorari process passes constitutional muster, for the types of factual decisions being made by the Board.

In addition, the separation of powers doctrine cautions against imposing too broad a scope of review of the fact-finding made by an administrative agency. *Hoover Motor Exp. Co.*, 261 S.W.2d at 238, 195 Tenn. at 606. *Also see, Federal Radio Com. v. Nelson Bros. Bond & Mortg. Co.*,

289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166 (1933). When an administrative agency's fact-finding is limited to content-neutral objective criteria, neither the judiciary or the legislature should require that the judiciary substitute its judgement for that of the administrative agency.

IV. Plaintiffs Have no Prospect of Irreparable Harm.

The irreparable harm claimed by plaintiffs is the burden of a prior restraint on their sexually explicit speech. Chapter 6.54, as amended, no longer presents any prior restraint as it mandates a prompt administrative determination and that the status quo be maintained pending judicial review. Tenn. Code Ann. § 27-9-111 has been amended to provide for a judicial determination to be made within forty (40) days of the issuance of the writ of certiorari. Thus, plaintiffs cannot show any danger of irreparable harm. Further, since the plaintiffs' businesses now hold licenses the specter of prior restraint has been vanquished entirely.

V. The Public Interest is Advanced by Preventing the Harmful Secondary Effects Caused by Sexually Oriented Businesses.

Plaintiffs claim that the public interest is in free expression. While there is public interest in free expression, erotic messages are not entitled to the same protection given other speech. As the Supreme Court stated in *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310 (1976):

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is

> said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

Similarly, in *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438 (6th Cir. 1998), the Sixth Circuit stated that sexually explicit speech is not as protected as other types of speech and regulations regarding sexually explicit speech are not subject to strict scrutiny. The public's interest also lies in having the government protect its citizens from crime, disease, and urban blight, and in seeing that the laws designed to protect the public are enforced.

CONCLUSION

Upon the granting of sexually oriented business licenses to the corporate plaintiffs' businesses in this case, they lost their standing to challenge the procedure for obtaining a license as set out in the challenged ordinance. The entertainers application for review of the dissolution of the injunction by the trial court, is not yet ripe for adjudication because the Metropolitan Government is currently constrained by an agreed order from enforcing the ordinance against the entertainers until such time as the trial court rules on plaintiffs' second motion for a preliminary injunction. Chapter 6.54 of the Metropolitan Code, provides for prompt judicial review by issuing a license within forty (40) days of the filing of an appeal. The scope of review offered under a writ of certiorari is constitutionally sufficient. Plaintiffs cannot show that they are likely to succeed on the merits of their complaint or that

they will suffer irreparable harm in the absence of an injunction, and therefore the District Court's order dissolving the injunction should be upheld by this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the accompanying brief complies with the type-volume limitation as set forth in Fed. R. App. P. Rule 32(a)(7)(B)(i), in that the number of words in the brief is 8,506.

DATED: July 21, 1999

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 21st day of July 1999.

/s/ Shayna Abrams
Shayna Abrams

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	Case No. 3-97-1066 Judge Nixon Magistrate Griffin
JERRY C. PENDERGRASS, ET AL. Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant.	Consolidated Cases No. 3-97-1176 Judge Nixon Magistrate Judge Griffin

MEMORANDUM OF LAW

(Filed Jul. 21, 1998)

The defendants file this memorandum of law in support of their Motion to Dissolve the Preliminary Injunction. This Court identified two (2) reasons in its Memorandum for enjoining Metropolitan Government from enforcing its Sexually Orientated Business Ordinance: 1) Metropolitan Code Chapter 6.54 (hereinafter

"Chapter 6.54") did not sufficiently preserve the status quo; and 2) Chapter 6.54 did not provide for sufficiently prompt judicial review. Memorandum Opinion (Docket No. 22).

The Metropolitan Council amended Chapter 6.54 to correct the deficiencies noted in this Court's Memorandum Opinion by:

1. providing for maintenance of the status quo if there is a denial of an application, a denial of an application to renew, or a decision to revoke or suspend a license or permit; and

2. providing for prompt judicial review in the event of an adverse administrative decision.

In addition, the Metropolitan Council made three other amendments to Chapter 6.54: 1) shortening the administrative time limit for an administrative decision from eighty-four (84) days to a total of forty-seven (47) days; 2) treating any failure by any department to complete its investigation/inspection report within the time limit required as approval of the application by that department; and 3) providing that any failure on the part of the Sexually Oriented Business Licensing and Permitting Board ("Board") to have a quorum would result in the issuance of a license. The amendments were passed on third and final reading on February 3, 1998. A copy of amended Chapter 6.54 is attached as Exhibit A[1] to this motion.

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[1] The Council also provided that the ordinance would go into effect on March 1, 1998, but existing businesses are given until June 30, 1998, to submit an application. Existing entertainers must submit an application by April 15, 1998. Existing businesses were given a 120 day

(Continued on following page)

The Tennessee State Legislature also amended T.C.A. § 27-9-111 to correct its deficiencies. The amendment to the State's writ of certiorari statute now ensures prompt judicial review by providing that in cases involving First Amendment rights, a determination on the merits of an applicant's appeal of an adverse administrative decision will occur within forty (40) days of the court granting the writ of certiorari. A certified copy of the amendments to T.C.A. § 27-9-111 is attached as Exhibit B to this motion.

The Metropolitan Government respectfully submits that any deficiencies in Chapter 6.54 of the Metropolitan Code or T.C.A. § 27-9-111 have been corrected. The defendants respectfully request the Court to dissolve the preliminary injunction.

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS.

A preliminary injunction can be modified or dissolved. In order to determine whether a preliminary injunction or a temporary restraining order should be dissolved a court must consider: "(1) the likelihood of success on the merits, (2) whether irreparable injury will result without the injunction, (3) the probability of substantial harm to others, and (4) whether the public interest is advanced by the injunction." *International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991), *cert. denied*, 504 U.S. 973, 112 S. Ct. 2941, 119 L. Ed. 2d 565

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grace period to come into compliance and existing entertainers were given a 45-day grace period to come into compliance.

(1992). It is also generally held that "the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

A. The Administrative Determination Is Prompt

Any sexually oriented business or any entertainer seeking to work in such a business must obtain a license or a permit.[2] Once an application for a license is submitted by a sexually oriented business, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business and report the results of their inspections to the Board. Metropolitan Code Sec. 6.54.040(B)(1). The application is also sent to the Police Department so that a criminal background check may be run on the applicant. *Id.* The background check is necessary to ensure that no applicant has recently been convicted of a crime of a sexual nature.[3] The results from the inspections and the investigative reports are

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[2] The following persons must obtain a license: any partner of a partnership who will participate in the day-to-day operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant who will participate in the day-to-day operation of the business. § 6.54.040(A)(4). A person desiring to be an entertainer in a sexually oriented business must obtain a permit. § 6.54.060(A).

[3] As discussed in detail *infra*, a conviction for a misdemeanor violation makes the applicant ineligible to receive a license for two years from the date of the conviction. For felony convictions, the period is five years. Chapter 6.54.050(B)(2)(a) and (b), 6.54.080(A)(2)(a) and (b). The constitutionality of these provisions was discussed in the Defendant's Brief in Opposition to Plaintiff's Motion for a Temporary Restraining Order, pp. 5-7.

given to the Board within twenty (20) days of the filing of the application. Metropolitan Code Sec. 6.54.040(B)(1). Any failure of a department to perform its investigation and provide the required information within the required time to the Board shall be treated as though that department approved the application. *Id.*

Once the Board has received the reports from the departments, it must meet and grant or deny the application within fifteen (15) days. Metropolitan Code Sec. 6.54.040(C)(1). Further, if the Board does not meet or it meets but does not have a quorum, the license is "deemed approved" and mailed to the applicant. *Id.* If the Board meets on the last of the fifteen days permitted under the ordinance, and allowing one day to mail a denial, the administrative process will be completed in forty-seven (47) days.

If the Board denies an application, the applicant may either appeal to the Board for a full hearing or proceed immediately to court. Metropolitan Code Sec. 6.54.040(E)(1)-(2). Should the applicant decide to appeal to the Board, the applicant has five (5) days to appeal and the Board has fifteen (15) days in which it must meet and hear the appeal. Metropolitan Code Sec. 6.54.040(E)(1)(a)-(b). Allowing one (1) day for the Board to mail its written decision (an oral decision will be rendered at the hearing, Metropolitan Code Sec. 6.54.040(E)(1)(d)), the applicant, at his/her option, may add an additional twenty-one (21) days to the administrative process. The same time limits and restrictions on the departments and the Board apply to permit applications for individual entertainers. Metropolitan Code Sec. 6.54.070(D).

B. The Status Quo Is Maintained Pending Judicial Review

The amended ordinance allows currently operating applicants sixty (60) days to appeal an adverse administrative decision:

> For an existing sexually oriented business, as defined in 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. . . . Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty (60) days from the date of the decision to allow the affected party time to seek judicial review, §§ 6.54.040(E)(3). (See § 6.54.070(D)(3) for the identical provision applicable to permit applicants).

As a result of the amendments, businesses and existing entertainers may continue to operate until the court makes a judicial determination on the merits of their appeal. Metropolitan Code Sec. 6.54.040(E)(3). In the alternative, should an existing business or an existing entertainer choose to forgo an appeal to the court they may continue to operate until the time to appeal from an administrative decision has expired. *Id*; T.C.A. § 27-9-102.

C. Judicial Review Is Prompt

1. Writs of Certiorari.

Article VI, Section 10 of the Tennessee Constitution provides that:

> The Judges or Justices of the Inferior Courts of Law and Equity, shall have the power in all civil

> cases, to issue writs of certiorari to remove any cause or the transcript of the record thereof, from any inferior jurisdiction, into such court of law, on sufficient cause, supported by oath or affirmation.

Certiorari at common law performed the function of review and supervision of the proceedings of inferior boards, tribunals by a superior tribunal, not taking the place of appeal or writ of error, but bringing up the entire record in order to make a determination whether there has been an absence or excess of jurisdiction, or a failure to proceed according to the essential requirements of the law. *Conners v. City of Knoxville*, 136 Tenn. 428, 432, 189 S.W. 870, 871 (Tenn. 1916). In Tennessee, common law writs are authorized by T.C.A. § 27-8-101:

> The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

A common-law writ is granted by a court so that it can inspect the proceedings of an inferior tribunal or board to determine whether there have been any irregularities. *Owens v. State Bd. of Architectural and Eng'g Exam'rs*, No. 89-327-11, 1990 50722 (Tenn. Ct. App., M.S. April 25, 1990), *perm. app. denied*, (Tenn. July 30, 1990) (unpublished disposition, copy attached). In *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978), the Tennessee Supreme Court held that the following additional circumstances warrant review under a common-law writ of certiorari:

1. Where the ruling of the inferior tribunal represents a fundamental illegality;
2. Where the ruling constitutes a failure to proceed according to the essential requirements of the law;
3. Where the ruling is tantamount to the denial to either party of a day in court;
4. Where the action of the judge was without legal authority;
5. Where the action of the judge constituted a plain and palpable abuse of discretion;
6. Where either party has lost a right or interest that may never be recaptured.

The court, before granting the request for issuance of a writ of certiorari, may require notice of the application to be given to the adverse party or may issue the writ without notice. T.C.A. § 27-9-108. Since a petition for a writ of certiorari may be *ex-parte*, the petition itself must contain sufficient allegations of illegality, irregularity or one of the circumstances above to demonstrate the grounds for granting the writ of certiorari. *Jasper Engine & Transmission Exch. v. Mills*, 911 S.W.2d 719 (Tenn. Ct. App. 1995).

Under Tennessee Code Annotated § 27-9-101, anyone aggrieved by any final judgement of a board may have that judgment reviewed by the courts by a writ of certiorari if a procedure for review is not otherwise specifically provided for. Not only may any party appeal an administrative decision to the courts, but any administrative decision making any material change in the status of the matter

can be held in abeyance within the discretion of the court.[4] T.C.A. § 27-9-106(a).

2. T.C.A. § 27-9-111 As Amended.

Tennessee Code Annotated § 27-9-111 addresses the briefing hearing and schedule used in processing a writ of certiorari. It is this section which has been amended by adding the following:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of *certiorari*. When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven days of the grant of the writ of *certiorari*.

In its Memorandum Opinion, the Court found that the prior version of T.C.A. § 27-9-111 did not require the chancellor to issue an opinion within any mandated period of time. Mem. Op. p. 12. (Docket No. 22). Tennessee Code § 27-9-111, as amended, provides that all First Amendment cases will be heard and decided within forty (40) days from the grant of certiorari.

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[4] This provision will be unnecessary in the matter at bar as the amendments to 6.54 maintain the status quo.

The District Court, in *DLS v. City of Chattanooga*, 894 F.Supp. 1140, 1148 (E.D. Tenn. 1995), found the "prompt judicial review" requirement was met by the provision in the Chattanooga ordinance that required the City Attorney for Chattanooga, within five (5) days of a final administrative action, to institute suit for a declaratory judgment in the Chancery Court of Hamilton County. Chattanooga City Code, § 11-424(d). Amended T.C.A. § 27-9-111 provides an expedited hearing in which the initial judicial review and decision shall occur within forty (40) days of the issuance of the writ of certiorari. This time limit would not only satisfy *DLS, supra* but also satisfy *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L.Ed.2d 603 (1990) and *East Brooks Books v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995) (rehearing and suggestion for rehearing *en banc* denied May 5, 1995).

In *East Brooks Books* the Sixth Circuit stated:

> Although the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible.

48 F.3d at 225, (citing *Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 562, 95 S. Ct. 1239; 1248, 43 L. Ed. 2d (1975) (a delay of more than five months was excessive)). Though several cases discuss prompt judicial review, these cases give no indication of what specific period of time is sufficient to satisfy "prompt."

The one case which discussed a specific number of days to provide judicial review is *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). Mr. Milton Luros returned to the United States from Europe with 37 photographs. A customs

agent, acting pursuant to the Tariff Act, 19 U.S.C.A. § 1305(a), seized the photographs as obscene material. 402 U.S. at 365-66, 91 S.Ct. at 1402-03. The Supreme Court analyzed *Thirty-Seven Photographs* under *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). 402 U.S. at 367, 91 S.Ct. at 1403. *Thirty-Seven Photographs* was scrutinized under the more burdensome *Freedman* test, as opposed to the test utilized in *FW/PBS* and the other licensing cases[5], since *Thirty-Seven Photographs* was not content neutral review but clearly censorship. Though the federal statute stated that prompt judicial review was available, it did not set out a time limit in which that review had to occur. 402 U.S. at 368, 91 S. Ct. at 1407. The Court examined other cases and determined that sixty (60) days for the completion of judicial proceedings was sufficiently prompt to satisfy the demand of prompt judicial review and imposed it upon the statute. 402 U.S. at 374-75, 91 S. Ct. at 1407.

> [N]o undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305(a) to require intervals of no more than 14 days from seizure of the goods to the

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[5] Since the Court found that under the *Freedman* factors sixty days for a judicial review of the seizure was "prompt," surely under the less burdensome *FW/PBS* test sixty days for judicial review must be prompt. Further, the lesser standard of *FW/PBS* may permit more than sixty days to satisfy the requirement of a "possibility of prompt judicial review.

> institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court. 402 U.S. at 373-74, 91 S. Ct. at 1407.

Under Chapter 6.54 of the Metropolitan Code, the entire period of time from application to final judicial determination on the merits will only take eighty-seven (87) days, unless the applicant, at his or her option, requests to have an administrative hearing before the Board prior to appealing to the courts. The entire initial administrative process of application, inspection and investigation, and the initial administrative determination of the board (including the additional ten (10) day extension for any necessary additional investigation) only consumes forty-seven (47) days. Metropolitan Code Sec. 6.54.040(C)(8). The judicial review must now be completed in forty (40) days under T.C.A. § 27-9-111 as amended. The entire eighty-seven (87) day administrative and judicial process is three (3) days less than the former administrative determination period previously held to meet constitutional requirements. Mem. Op. at 8-9. (Docket no. 22). Twenty-one (21) additional days may be added to the administrative determination at the applicant's option, if he or she chooses to appeal to the Board for an administrative hearing (five (5) days to appeal, fifteen (15) days for the Board to meet, one (1) day to issue the written decision). Metropolitan Code Sec. 6.54.040(E)(1).

3. Chapter 6.54 As Amended Provides For A License or Permit In The Event The Court Fails To Adjudicate The Matter Promptly.

Metropolitan Code § 6.54.040(E)(3), as amended, also strengthens prompt judicial review.

> [I]f the court fails to rule within forty (40) days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with 6.54.150(A)(10).

Metropolitan Code § 6.54.070(D)(3) has the identical provision regarding permits.

As amended, Chapter 6.54 maintains the status quo and provides for prompt judicial review. Chapter 6.54 does not permit enforcement of any adverse administrative decision until the statutory time for appeal has passed. If the applicant appeals an adverse administrative decision, the decision is stayed until there is a judicial determination on the merits. Chapter 6.54 also provides that if the reviewing court has not made a decision on the merits within forty days, the license or permit shall issue. Even without the recent amendments to T.C.A § 27-9-111, on its face, Chapter 6.54 satisfies the requirement of prompt judicial review.

The recent amendment to T.C.A. § 27-9-111 provides for a judicial decision on the merits within forty (40) days from the date the state court grants the writ of certiorari. The amendments to Chapter 6.54 and T.C.A. § 27-9-111 together eliminate the issues raised by the plaintiffs in

their motions for a preliminary injunction and address the deficiencies noted by the Court that compelled it to grant the preliminary injunction. Since the amended versions of Chapter 6.54 and T.C.A. § 27-9-111 now fulfill the requirements of *FW/PBS, Inc. v. City of Dallas*, plaintiffs cannot show a likelihood of success on the merits.

II. PLAINTIFF'S HAVE NO PROSPECT OF IRREPARABLE HARM.

The irreparable harm claimed by plaintiffs is the burden of a prior restraint on their sexually explicit speech. Chapter 6.54, as amended, no longer presents any prior restraint as it mandates a prompt administrative determination and that the status quo be maintained pending judicial review. T.C.A. § 27-9-111 has been amended to provide for a judicial determination to be made within forty (40) days of the issuance of the writ of certiorari. Thus, plaintiffs cannot show any danger of irreparable harm.

III. THE PUBLIC INTEREST IS ADVANCED BY PREVENTING THE HARMFUL SECONDARY EFFECTS CAUSED BY SEXUALLY ORIENTED BUSINESSES.

Plaintiffs claim that the public interest is in free expression. While there is public interest in free expression, erotic messages are not entitled to the same protection given other speech. As the Supreme Court stated in *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310, (1976):

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is

> said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

Similarly, in *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438 (6th Cir. 1998), the Sixth Circuit stated that sexually explicit speech is not as protected as other types of speech and regulations regarding sexually explicit speech are not subject to strict scrutiny.

The public's interest lies in having the government protect its citizens from crime, disease, and urban blight, and in seeing that the laws designed to protect the public are enforced. This is the interest that militates against this preliminary injunction.

IV. PLAINTIFFS HAVE FAILED TO COMPLY WITH FED. R. CIV. P. 65 WHICH REQUIRES THE GIVING OF SECURITY PRIOR TO THE ISSUANCE OF AN INJUNCTION.

Fed. R. Civ. P. 65(c) requires that no preliminary injunction shall issue unless the applicant shall have given security in such sum as the Court deems proper for the payment of such costs and damages as ~~may be~~ incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Plaintiffs have given no such security in the instant case. Thus, for this additional reason, the preliminary injunction should be dissolved.

CONCLUSION

The amendments to Chapter 6.54 respond to the deficiencies noted by the Court in its previously entered Memorandum. The amendments require a more prompt administrative determination, maintain an applicant's status quo during the administrative and judicial appeal processes, and provide for prompt judicial review. The recent amendments to T.C.A. § 27-9-111 ensure prompt judicial review because the court must rule within forty (40) days of the issuance of the writ of certiorari.

Defendants respectfully submit that plaintiffs are no longer entitled to an injunction against the enforcement of Chapter 6.54. Plaintiffs can no longer show that they are likely to succeed on the merits of their complaint or that they will suffer irreparable harm in the absence of an injunction, and therefore the injunction should be dissolved.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 21st day of July, 1998.

/s/ Shayna Abrams
Shayna Abrams

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity Defendants.	)	Case No. 3-97-1066 Judge Nixon Magistrate Griffin

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

(Filed Nov. 26, 1997)

Come the defendants, through counsel, and for their response to plaintiffs' motion for a preliminary injunction, state as follows:

STATEMENT OF FACTS

Chapter 6.54 of the Metropolitan Code of Laws was passed on third and final reading on August 19, 1997. (A copy of the ordinance, as codified, is filed as Exhibit I). Pursuant to Chapter 6.54, all sexually oriented businesses are required to obtain licenses, and all individuals desiring to be entertainers at sexually oriented businesses are required to obtain permits.

Any business or entertainer may obtain a license or a permit by application.[1] Once an application is submitted by a sexually oriented business, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business and report the results of the inspection to the Sexually Oriented Businesses Licensing and Permitting Board ("the Board"). The application is also sent to the police department so that a criminal background check may be run on the applicant. The background check is necessary to ensure that no applicant has recently been convicted of a crime of a sexual nature.[2] This report is also given to the Board.

All inspection results and reports must be completed and returned to the Board within thirty days of the filing of the application, however the Board has adopted a policy (Policy No. 80) that all inspection results and reports must be prepared and submitted to the Board within one week of the filing of the application. (A copy of the entire set of the Board's policies is filed as collective Exhibit 2).

Once the Board has received the reports from the departments, it must meet and grant or deny the application

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[1] The following persons must obtain a license: any partner of a partnership who will participate in the day-to-day operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant who will participate in the day-to-day operation of the business. § 6.54.040(A)(4). A person desiring to be an entertainer in a sexually oriented business must obtain a permit. § 6.54.060(A).

[2] As discussed in detail *infra*, a conviction or plea to a misdemeanor violation makes the applicant ineligible to receive a license for two years from the date of the conviction, plea, or release from confinement. For felonies, the period is five years. Chapter 6.54.040(C)(2)(a) and (b).

within twenty days. § 6.54.040(C). As stated in sections 6.54.040(C) and 6.54.070(D), the Board has no discretion with respect to granting or denying an application. If the applicant has reached eighteen years of age, and has not been recently convicted of a crime of a sexual nature and the business complies with the applicable fire, health and zoning codes, a license **must** issue.[3] The same time limits and Board policies apply to permit applications for individual entertainers. So long as the applicant is eighteen and has not recently been convicted of a crime of a sexual nature, the Board **must** issue the permit.

Licenses and permits may only be suspended or revoked for the ten specific reasons listed in section 6.54.140. These reasons include, but are not limited to, the discovery that the applicant has made a false or misleading statement on the application, that the required fees have not been paid, that intoxicating liquor or narcotics are being sold on the premises. The Board may not suspend or revoke a license for any reason other than those listed in section 6.54.140.

ARGUMENT

A preliminary injunction is an extraordinary and drastic remedy and a plaintiff's motion for preliminary injunctive relief "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong* ___ U.S. ___, ___, 117 S.Ct. 1865, 1867, 138 L.Ed.2d 162 (1997). In order to determine

[3] The Board additionally requires that the applicant be found not to have given any false or misleading information on the application or to have omitted any material facts from the application. § 6.54.040(C)(1).

whether a motion for a preliminary injunction or a temporary restraining order should be granted, a court must consider: "(1) the likelihood of success on the merits, (2) whether irreparable injury will result without the injunction, (3) the probability of substantial harm to others, and (4) whether the public interest is advanced by the injunction." *International Resources. Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991), *cert. denied*, 504 U.S. 973, 112 S.Ct. 2941, 119 L.Ed.2d 565 (1992). It is also generally held that "the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *In re: DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Because the court must consider whether the movant will suffer irreparable harm without the order and whether the movant has a reasonable chance of ultimately prevailing on the merits, the court may consider the potential harm that the order would cause the opposing party and where the public interest lies. *Con-Way Southern Express v. Hewlett*, 758 F. Supp. 464, 465 (M.D. Tenn. 1991).

The Sixth Circuit has recognized that:

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction; it is the strong arm of equity, that never ought to be exerted unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18 Intern. Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied*, 411 U.S. 967, 93 S.Ct. 2149, 36 L.Ed.2d 687 (quoting Justice Baldwin in *Bonaparte v.*

Camden, C.D.N.J. 1830, 3 Fed. Cas. 821, 827 (No. 1, 617)).

In the instant case, plaintiffs have failed to carry their burden of establishing that they are entitled to the extraordinary relief sought for the following reasons.

I. Plaintiffs have not established a likelihood of success on the merits.

Plaintiffs have limited their motion to the issue of prompt judicial review. However, because Chapter 6.54 fulfills the dictates of *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596, 493 U.S. 215, 107 L.Ed.2d 603 (1990), there is little likelihood that plaintiffs will succeed on the merits. In *FW/PBS*, the Supreme Court held that restraint may be imposed on protected speech prior to judicial review when: (1) the decision-maker has limited discretion, (2) the decision whether to issue the license is made within a specified and reasonable time period during which the status quo is maintained, and (3) there is the possibility of prompt judicial review in the event that the license is erroneously denied. *FW/PBS*, 493 U.S. at 225-228, 110 S.Ct. at 605-06.

Chapter 6.54 gives the Board very limited discretion and it ensures that the license will be issued or denied within a specified and reasonable time period during which the status quo is maintained. §§ 6.54.040 and 6.54.070. In addition, the possibility of prompt judicial review exists. § 6.54.160.

A. The Board has limited discretion.

The Board's discretion to deny a license or permit is specifically limited in sections 6.54.040(C)(1) and 6.54.070. The board may only deny a license or a permit for four reasons: (1) the applicant has been convicted of a defined sexually-related felony in the past five years or a misdemeanor within the last two years; (2) the applicant has violated the provisions of the zoning code applicable to sexually oriented businesses within the past two years; (3) the applicant has given false information on the application or has omitted material information from the application; or 4) the applicant has refused to give any information relevant to the investigation of the application or refused to appear for examination under oath regarding the application.

Except for the reason of furnishing false information or omitting material facts from the application, these reasons for denial were examined by the Sixth Circuit in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (rehearing and suggestion for rehearing *en banc* denied April 15, 1997). In *DLS*, The Sixth Circuit ruled that the challenge of the substantive requirements of the licensing procedure was without merit. *Id.*, at 414. Similar to Chapter 6.54, the substantive requirements for the issuance of a license or permit under the Chattanooga ordinance are that the applicant: (1) must be at least eighteen years of age; (2) must not have been convicted of or pleaded *nolo contendre* to "a felony or any crime involving moral turpitude, prostitution, obscenity, or other crime of a sexual nature" within the past five years; and (3) must not have been found to have violated the ordinance within the past five years. Chattanooga, Tenn.,

City Code §§ 11-425, 11-428. (Exhibit 3). Examining these criteria, the Sixth Circuit stated:

> In our view, the ordinance survives the First Amendment challenge; it does not allow City officials to "exercise discretion by passing judgment on the content of the protected speech," *FW/PBS. Inc. v. City of Dallas*, 493 U.S. 215, 229, 110 S.Ct. 596, 607. 107 L.Ed.2d 603 (1990), and it **sufficiently limits the discretion of the decision-maker.** *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 2144, 100 L.Ed.2d 771 (1988); *DLS, supra* at 414. (emphasis added).

According to the Sixth Circuit, the only criteria which was not "wholly objective" was the requirement that the applicant not be convicted of a "crime of moral turpitude." *DLS* at 414-15. However, the Sixth Circuit found that this is a defined term of art in Tennessee. *Id.* The Sixth Circuit concluded that:

> [T]he decision-maker under the Chattanooga ordinance is constrained by objective criteria, and the standards for licenses and permits under §§ 11-425 and 11-428 do not violate the First Amendment. *DLS*, at 415.

Thus, like the substantive requirements found to limit the discretion of the decision-maker under the Chattanooga ordinance, essentially the same requirements serve to limit the discretion of the Board under Chapter 6.54.

Like denials, suspensions and revocations of licenses and permits are also limited to specific circumstances

under Chapter 6.54.[4] Further, the Board has the authority to fine any license or permit holder for violation of any of the provisions of Chapter 6.54. *See*, § 6.54.150, penalties and prosecutions. Based on the above discussion, it is clear that the ordinance vests the administrative decision

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[4] Under section 6.54.140 the Board shall revoke (or suspend) a license or permit only if one of the following conditions is found to exist:

- it discovers that false or misleading information or data was given on any application, or material facts were omitted from any application;
- the operator or entertainer becomes ineligible to obtain a license (or permit) by being convicted of a (specified) crime of a sexual nature;
- any cost or fee required to be paid by this chapter is not paid;
- an operator employs an entertainer who does not have a permit or provides space to an independent contractor who works as an entertainer without a permit;
- any liquor, beer, or narcotic is sold or allowed to be sold on the licensed premises;
- any operator, employee or entertainer sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material;
- any operator, employee or entertainer denies access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;
- any operator allows continuing violations of the metropolitan code or the rules and regulations of the following departments: health, codes, fire, or zoning, or any violations of this chapter;
- any operator fails to maintain the licensed premises in a clean, sanitary and safe condition in accordance with the applicable statutes, ordinances and regulations of the federal, state and local governments; or
- the attempted transfer of a license/permit or any interest in a license/permit shall automatically and immediately revoke the license.

maker (the Board) with very limited discretion. Therefore, Chapter 6.54 fulfills the first prong of the test under *FW/PBS*.

B. The Board must make its decision within a limited, reasonable amount of time.

1. Application procedure.

The second prong of the test under *FW/PBS* is that the decision to grant or deny the license or permit must be made in a specific, reasonable period of time. *FW/PBS*, 493 U.S. at 226. Chapter 6.54 sets out a time limit for every step of the administrative process, and these time limits are reasonable. Therefore, Chapter 6.54 passes this prong of the *FW/PBS* test.

In *DLS, supra*, the District Court considered the time limits for issuing a license or a permit under the subject ordinance. *DLS, Inc. v. City of Chattanooga*, 894 F.Supp. 1140 (E.D.Tenn. 1995). The Chattanooga ordinance provides for a maximum time period of sixty days, from the date of the application to the date of the initial administrative decision. Then, after an adverse initial decision by the city treasurer, an applicant has ten days to request a hearing before the City Council. Chattanooga City Code § 11424(d). Based on these time limits, the District Court stated:

> While the Ordinance does not specify that the City Council must meet within any specified period of time, the Ordinance can be construed to require a meeting within a reasonable period of time. If the City Council denies a license application, the City Attorney shall within five days institute suit for declaratory judgment in state

> court for review of the denial. *Id.* It is very clear that the Ordinance's licensing procedure **places specified brief time limits on the decision-makers and does provide for prompt judicial review.** This procedure, therefore, does not contravene the First Amendment. *DLS, supra*, 894 F. Supp., at 1148.

Similarly, Chapter 6.54 has set out a list of specified reasonable time limits in which all steps in the procedure must occur. Once the application is filed it must be "distributed promptly" to the necessary departments. Section 6.54.040(A)(1). The Board has interpreted "distributed promptly" to mean that the application shall be accepted by the administrator and sent out that day, or if it is submitted anytime after 4:00 p.m., then it must be sent out the following business day. Board Policy 5, collective exhibit 2. The departments of Fire, Health and Codes Administration **must** complete their respective inspections and present their reports to the Board within thirty days. Section 6.54.040(B)(3). Once the inspections are completed and the reports are filed with the Board, the Board has twenty days to examine the application and the reports and decide to grant or deny the license. Section 6.54.040 (C)(1). In addition, under Chapter 6.54 the Board (like Chattanooga) may hold an application for an additional thirty (30) days for further investigation. Sections 6.54.040(C)(7) and 6.54.070(D). Finally, the Board has adopted policy no. 70 which provides that any failure of the Board to act within the time allowed by the ordinance on any application shall result in the application being granted. *See*, collective exhibit 2.

Thus, under Chapter 6.54, a maximum period of eighty-one days can elapse between the filing of the

application and the initial administrative decision whether to grant or deny a license or permit. This is only twenty-one days longer than the sixty day period the District Court found constitutional in *DLS,* and which the Court found constitutional in *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1570 (M.D.Tenn. 1989). Thus, the time limit placed on the administrative decision-maker in Chapter 6.54 is constitutional.

2. Denial of application.

Should an application be denied, the applicant has the option of requesting a hearing before the Board. If the applicant wishes to proceed directly to Chancery Court without a hearing before the Board, the applicant may do so. Under section 6.54.040(E)(1)(f), the denial of an application becomes final ten days after the applicant is notified of the denial; provided that the applicant does not request a hearing before the Board within that ten day period. It is only at the option of the applicant that the Board hears the case (and thereby delays judicial review of the Board's initial decision). Section 6.54.070(D)(7) states: "**Any** denial of the application for a permit may be immediately appealed to the Chancery Court of Davidson County." (Emphasis added).

3. Hearing of a denial by the board.

If the applicant wishes to bring the matter before the Board, the applicant may request a hearing within ten days from the date the applicant is notified that the application was denied. Section 6.54.040(E). Once the request is made, the Board will hear the matter at the next meeting which, since the ordinance requires that the

board meet twice a month, would be fifteen days from the request at most. Sections 6.54.020(D)(1) and 6.54.040(E)(1)(b). At the hearing, the Board will grant or deny the license or the permit. Section 6.54.040(E)(1)(d). If the license or permit is denied, the Board will announce that denial at the meeting. *Id.* Written notification of the Board's decision will be issued immediately. *Id.* The applicant has the choice of waiting to receive written notification of the Board's action before filing a Chancery Court action, or to file a Chancery Court action immediately upon the Board taking action at its meeting. Section 6.54.040(E)(2). The only time period over which the applicant has no control is the time from the request for a hearing to the time of the Board's next meeting (which would be a maximum of 15 days). However, awaiting the Board to conduct a hearing is entirely in the applicant's discretion since the applicant may elect to proceed to Chancery Court immediately upon the initial denial of the application. At most, a Board hearing would occur ~~81~~ 96 days after the application is filed.

C. The possibility of prompt judicial review exists.

1. Local Rules §§ 30.02 and 30.03 provide for the possibility of prompt judicial review.

Local rules §§ 30.02 and 30.03, when read together, satisfy the third requirement of *FW/PBS*: that the possibility of prompt judicial review exist. (Exhibit 4). Rule 30.02 provides, among other things, that upon motion of a party, or upon its own motion, a court may shorten the time for filing briefs in a case brought under the common law writ of certiorari as an appeal of an administrative decision.

Rule 30.03 then provides that hearings for oral argument shall be set as provided in Local Rule 18 after the record has been filed. (Exhibit 5).

Chapter 6.54 provides that the Metropolitan Government shall file the administrative record within 10 days from the date it was served. Section 6.54.040(E)(2). Thus, in order to provide prompt judicial review, the applicant can move the Chancery Court to establish an expedited briefing schedule, and, pursuant to Local Rule 18.01, the applicant may move the Court to set an early trial date, and receive prompt judicial review.

Contrary to plaintiffs' assertion, T.C.A. 27-9-111 does not act as a bar to prompt judicial review of a matter brought under the common law writ of certiorari. The statute merely states, in pertinent part, that "at the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial. . . . " There is no prohibition against setting such a case for trial prior to ninety days from the filing of the transcript. Defendants submit that to the extent T.C.A. 27-9-111 purports to establish such a prohibition, it violates the separation of powers doctrine, as set forth in Article II, Section 2 of the Tennessee Constitution. One of the inherent powers of a court is its ability to manage its own docket, including the authority to make such decisions as when to set cases for trial. Clearly, Local Rules 30.02, 30.03 and 18 provide the means by which the Courts of the Twentieth Judicial District establish briefing schedules and trial dates in matters brought under the common law writ of certiorari. To the extent that plaintiffs argue that T.C.A. 27-9-111 may attempt to impair the independent exercise of the inherent judicial power of the court to manage its own docket, the statute is unconstitutional. See, *Summers v.*

Thompson, 764 S.W.2d 182, 188-190 (Tenn. 1988) (Justice Drowota, concurring).

In addition, the plaintiffs' interpretation of T.C.A. 27-9-111 would result in the conclusion that this statute violates the Supremacy Clause of the U.S. Constitution. Given the clear Supreme Court holdings that prior restraints on alleged First Amendment rights must be subject to prompt judicial review, if the statute mandates the result advocated by plaintiffs, the statute would prevent such review in these cases, and would be constitutionally infirm.

2. An applicant may seek Chancery Court relief in the form of an application for a temporary restraining order or a request for a preliminary injunction.

Plaintiffs cite *East Brooks Books v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), *cert. denied* ___ U.S. ___, 116 S.Ct. 227, 133 L.Ed.2d 198 (1995), for the proposition that there can never be "prompt" judicial review of an administrative decision in Tennessee as a result of the alleged built-in 90 day delay required by Tenn. Code Ann. § 27-9-111. Plaintiffs contend that prompt judicial review is precluded by the fact that this 90 day period will be required to pass before the matter may stand for trial. Under plaintiffs' theory, this 90 day requirement fatally flaws any legislative enactment which contemplates the writ of certiorari as the sole vehicle of judicial review. However, while the ordinance at issue in *East Brooks Books* **required** the applicant to seek review of the administrative decision by a common law writ of certiorari proceeding in accordance with Tenn. Code Ann. § 27-9-111,

the subject ordinance does not limit the applicant to that one vehicle of judicial review. Indeed, it is doubtful that a local legislative body would have the power to limit avenues of judicial review, even if it chose to attempt to do so.

Plaintiffs also refer to the case of *Smith v. City of Clarksville*, No. 3-94-0539, (M.D. Tenn., slip opinion dated 3-14-96, Echols, J.), a copy of which is attached to their motion as Exhibit E. The Clarksville ordinance at issue in *Smith, supra*, allowed for appeal "to a court of competent jurisdiction." In its opinion, the Court did not consider, and there is no indication the defendant raised, the possibility of prompt judicial review by also requesting a temporary restraining order or preliminary injunctive relief. The Court's analysis was limited to considering a petition for a writ of certiorari. The Court ruled that it was constrained by the Sixth Circuit's holding in *East Brooks Books* to find that the possibility of prompt judicial review did not exist. *Smith*, supra, at 16.

Though Chapter 6.54 provides for an appeal to the Chancery Court of Davidson County, the ordinance itself does not limit plaintiffs' judicial remedies. Chapter 6.54 specifically states:

> The denial of any renewal for a license (or a permit) may be appealed to the chancery court of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the chancery court for Davidson County. **If the applicant or the permittee/licensee *chooses* to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings to date (the date of the filing) with the court within ten days from the**

> **date the metropolitan government was served.** Chapter 6.54.100(M). (Emphasis added).
>
> Any revocation or suspension of a license or a permit or any denial of a license or a permit or any denial to renew a license or a permit under the provisions of this chapter may be immediately appealed to the chancery court of Davidson County by the applicant. Any fine levied under the provisions of this chapter may be immediately appealed to the chancery court of Davidson County by the applicant. The metropolitan department of law may institute proceedings for a declaratory judgment in the chancery court of Davidson County. If the applicant or the permittee/licensee chooses to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings to date (the date of the filing) with the court within ten days from the date the metropolitan government was served. Chapter 6.54.160.

All that is constitutionally required is the availability to the applicant of prompt judicial review in the event the application is erroneously denied, suspended or revoked. *FW/PBS, supra*, 110 S.Ct. at 606. The Sixth Circuit found that the ordinance at issue in *East Brooks Books* did not allow for the possibility of prompt judicial review because that ordinance **mandated** the common law writ of certiorari as the sole avenue of judicial review. Thus, *East Brooks Books* is distinguishable on its facts. In *Smith, supra*, the Court adhered to the holding in *East Brooks Books*, limiting its analysis to the common law writ of certiorari as the sole vehicle to review the administrative decision at issue. Defendants respectfully submit, however, that the *Smith* court was not called upon to consider whether the availability of a temporary restraining order

or a promptly considered motion for preliminary injunction accompanying a writ of certiorari would satisfy the requirement of "prompt judicial review." Indeed, the Fifth Circuit has opined that the availability of a temporary restraining order satisfies the prompt judicial review requirement. *See Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068, 1070-71 (5th Cir. 1994).

The District Court, in *DLS, supra*, 894 F. Supp. at 1148, found the "prompt judicial review" requirement was met by the provision that upon final adverse administrative action, the City Attorney for Chattanooga would institute suit for a declaratory judgment in the Chancery Court of Hamilton County within five days, and would seek an immediate judicial determination of whether the license or permit may be denied under the law. Chattanooga City Code, § 11-424(d). However, if an applicant petitions for a temporary restraining order, or requests a prompt hearing on a motion for a preliminary injunction, the initial judicial review will be obtained faster than in the course of a declaratory judgment action. Since the availability of a declaratory judgment action satisfied constitutional muster in *DLS*, certainly the possibility of obtaining a temporary restraining order or a preliminary injunction satisfies the initial prompt judicial review requirement in the instant case.

3. The proposed new local rule will provide prompt judicial review.

If the Court is not already persuaded that the Davidson County courts will afford these plaintiffs prompt judicial review, defendants respectfully offer proposed new Local Rule § 30.05 to the Davidson County Rules of

Practice, the text of which is reprinted in its entirety here, and filed as Exhibit 6:

> § 30.05 Expedited Appeals
>
> If the petitioner-appellant alleges that the decision of an administrative tribunal or agency unlawfully results in the prior restraint of his or her rights that are guaranteed by the First Amendment to the U.S. Constitution, and either party requests an expedited hearing, the court shall immediately schedule a hearing, establish an expedited briefing schedule that will permit the court to adjudicate the matter promptly, and in no event later than fourteen days after the record is filed.

Since the Davidson County courts are the forum for adjudication of all appeals from state agencies, the Davidson County Circuit and Chancery Courts have adopted local rules to specifically manage appeals from administrative decisions. Under the proposed new rule, an applicant would have a decision by the Chancery Court within twenty-five days after the license/permit has initially been denied, suspended or revoked by the Board. This twenty-five day period includes an allowance for the filing of the Chancery Court appeal and service upon the Metropolitan Government (1 day after denial), the filing of the record (10 days after service), and the Chancery Court hearing and decision (14 days after filing the record). This is prompt judicial review.

II. The prospect of irreparable harm to plaintiffs weighed against the likelihood of harm to others.

The possibility of the proposed local rule leads to consideration of the issue of the irreparable harm plaintiffs suggest they will suffer to justify the preliminary injunctive relief requested in their complaint. Chapter 6.54, by its terms, allows sexually oriented businesses to continue to operate, and requires them to apply for a license within 120 days from the effective date of the ordinance. § 6.54.030(F)(1). The ordinance became effective on November 1, 1997, and the 120 day period expires on March 1, 1998. Similarly, entertainers wishing to perform entertainment at sexually oriented businesses have 45 days from November 1, 1997 to apply for a permit under the ordinance. § 6.54.060(B). This time period expires on December 15, 1997. Until that time they may continue to perform. Both categories of applicants may continue to conduct business during the pendency of their applications until the Board has acted on the applications. §§ 6.54.030(F)(1) and 6.54.060(B). Thus, there is no likelihood of harm during the pendency of their applications.

No infringement on any license or permit applicant's alleged First Amendment rights can occur until, at the earliest December 25, 1997 for a permit applicant, or March 11, 1998 for a license applicant, since any denial is stayed for ten days after the Board's decision. Plaintiffs cannot show that they will be irreparably harmed before Christmas, 1997. Defendants respectfully request that no temporary injunction issue before December 25, 1997, if the Court determines it requires a local rule to evidence the Davidson County Courts' intention that cases such as the ones at issue will be afforded prompt judicial review.

Defendants submit there is no possibility of harm to plaintiffs until that date, and there is the possibility that the proposed Local Rule § 30.05 may be adopted by that time, thus resolving any concern the Court may have regarding the availability of prompt judicial review.

Plaintiffs' alleged injury is the chilling of their First Amendment rights. They allege no monetary loss or any other type of harm. Plaintiffs have not closed any business locations nor have they alleged that their business practices or exhibitions have changed in any way. Plaintiffs have not applied for a license or a permit or attempted to comply with the regulations contained in the ordinance. There are no specific allegations which in any way demonstrate that the ordinance has harmed the businesses or impaired plaintiffs' ability to display and sell sexually explicit material.

The Supreme Court has held that subjective "chill" is not enough to constitute injury in fact. *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972). Justice Powell's concurrence in *Young v. American Mini Theaters*, 427 U.S. 50, 96 S.Ct. 2456, 49 L.Ed. 2d 318 (1972), listed two factors to be considered in assessing the harm suffered by the plaintiffs under the zoning ordinance at issue in that case saying:

> The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom

> they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them?

Young, 427 U.S. 78-79, 96 S.Ct. 2456. Justice Powell went on to answer both inquiries in the negative saying:

> At most the impact of the ordinance on these interests is incidental and minimal. Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [adult films]. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience.

Young, 427 U.S. 78-79, 96 S.Ct. 2456 (Justice Powell concurring).

Plaintiffs have failed to show that they will suffer any harm, much less irreparable harm, from the enforcement of Chapter 6.54. Without a showing of irreparable harm, plaintiffs are not entitled to an injunction.

Alternatively, there is the likelihood of substantial harm to others. In this case the "others" are the residents of Nashville and Davidson County. The granting of an injunction will result in continued harm to individuals impacted by the secondary effects of plaintiffs' activities. *See, e.g. Renton v. Playtime Theatres. Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Plaintiffs have failed to show the irreparable harm they will suffer in the event the injunction is not granted, therefore they are not entitled to an injunction.

III. The public interest is advanced by preventing the harmful secondary effects caused by sexually oriented businesses.

Plaintiffs claim that the public interest is in free expression. However, plaintiffs' continued operation and continued display of sexually explicit material demonstrates that their First Amendment rights are in no way chilled by the potential enforcement of the ordinance. Even if plaintiffs' First Amendment rights are at issue, it is the right to convey erotic messages, not, for example, the right to political speech which is in jeopardy. Erotic messages are not entitled to the same protection given to political speech. As the Supreme Court stated in *Young*:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.
>
> *Young*, 427 U.S. 70, 96 S.Ct 2452.

In this case, the public's interest lies in having the government protect its citizens from crime, disease, and urban blight, and in seeing that the laws designed to protect the public are enforced. This is the interest that militates against the extreme remedy of granting plaintiffs an injunction.

Chapter 6.54 regulates activity in a manner recognized by the courts to be of substantial interest to the government. Because plaintiffs' First Amendment rights are not burdened by implementation of the ordinance, the

public interest will best be served by allowing the ordinance to take effect.

CONCLUSION

Plaintiffs are not entitled to an injunction because they are unable to show they are likely to succeed on the merits. In determining whether to grant, deny, suspend or revoke a license or a permit, the discretion granted to the Board is limited. The Board is required to make a decision in a specified, brief period of time. The availability of a temporary restraining order and prompt injunctive relief demonstrate that plaintiffs have the possibility of prompt judicial review. Therefore, defendants respectfully submit that plaintiffs are not entitled to an injunction because they cannot show that they are likely to succeed on the merits or that they will suffer irreparable harm if an injunction does not issue. Furthermore, the public will suffer harm if the injunction is granted, and the societal concerns which prompted enactment of Chapter 6.54 will continue to exist, unabated. All the factors to be considered weigh in favor of denying the extraordinary remedy of an injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing RESPONSE has been sent via Federal Express and electronic mail to Bradley J. Shafer, 1902 Yuma Trail, Okemos, MI 48864 and via Federal Express and facsimile to (901)572-7399 to Michael F. Pleasants, 1916 Central Avenue, Memphis, TN 38104, on this day the 26th of November, 1997.

/s/ Shayna Abrams
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No. 05-1194

(3)

Supreme Court, U.S.
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MAY 19 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

DEJA VU OF NASHVILLE, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 118

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ALTERNATIVE QUESTION PRESENTED

Respondents submit that in light of the proceedings below, Petitioner's first question presented should properly be phrased as follows:

(1) Does a final judgment confirming a plaintiff's status as a "prevailing party" for purposes of 42 U.S.C. § 1988, no longer open on direct review, which is followed by a United States Supreme Court decision in another case that invalidates the theory on which the plaintiff prevailed, qualify as "special circumstances" that render the attorneys' fees award unjust?

LIST OF PARTIES BELOW/PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

All parties to the proceedings in the Sixth Circuit below are listed in the caption of this case as set forth in the Petition for a Writ of Certiorari.

Respondent Deja Vu of Nashville, Inc. states that its parent corporation is Dynamic Industries, Ltd., a Delaware (non-public) corporation. There is no publicly held company owning 10% or more of the stock of Deja Vu of Nashville, Inc.

Respondent Meroney Entertainment, Inc. states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of Meroney Entertainment, Inc.

Respondent The Pleasure Palace, Inc. states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of The Pleasure Palace, Inc.

Respondent The 822 Corporation states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of The 822 Corporation.

Respondent 421 Corporation states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of 421 Corporation.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Deja Vu of Nashville, Inc. ("*Deja Vu*"), Michael Rucker, Michael Butler, Meroney Entertainment, Inc. ("*Ken's Gold Club*"), the Pleasure Palace, Inc., Dawn Pierce, Elizabeth Martz, Jerry C. Pendergrass, The 822 Corporation and 421 Corporation (collectively "Respondents" or "Plaintiffs"), respectfully request that this Court deny the Petition for a Writ of Certiorari ("Petition") filed by the Metropolitan Government of Nashville and Davidson County (sometimes "Petitioner," or "Defendant," or "Metro") to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case.

ADDITIONAL OPINIONS BELOW

The district court's opinion and order vacating the permanent injunction are unreported and are found at App. 8-17.[1]

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of 42 U.S.C. § 1983 are found at App. 20, and the text of U.S.C. § 1988 is reproduced at App. 18-19. Chapter 6.54 of the Metropolitan Code of Laws has undergone numerous changes during the pendency of

[1] The Appendix hereto will be identified as "App.," and references to the Appendix as contained in the Petition will be abbreviated as "Pet. App."

this litigation. That ordinance was originally enacted by Bill No. O97-796 (App. 24-89); the first set of amendments thereto appears in Bill No. SO97-1022 (App. 90-118); the second set of amendments is contained in Bill No. O99-1503 (App. 119-161); the third set of amendments is set forth in Bill No. O99-1814 (App. 162-175); the fourth set of amendments are found in Bill No. BL99-61 (App. 176-181); and the last set of amendments are embodied in the revised codified version of Chapter 6.54 which is reproduced at App. 182-241.

In addition, the Petition refers to T.C.A. § 27-9-111 as the "Tennessee Writ of Certiorari Statute. . . . " Petition, p. 2. It is not. Throughout this litigation (at least up until the filing of the current Petition), Metro has taken the position that review of decisions of the Metropolitan "Sexually Oriented Business Licensing Board" is exclusively by way of the Tennessee common-law writ of certiorari, which is found at T.C.A. § 27-8-101 and which is reproduced at App. 21.

COUNTER-STATEMENT OF THE CASE

Respondents aver that Petitioner's Statement of the Case lacks sufficient detail, and set forth the following Counter-Statement of the Case.

The Petition has been filed in response to various awards for attorney fees and costs issued pursuant to 42 U.S.C. § 1988. These awards arose out of two actions commenced pursuant to 42 U.S.C. § 1983, which challenged the constitutionality of an ordinance enacted by the Petitioner generally known as Chapter 6.54 of the Metropolitan Code of Ordinances ("Ch. 6.54," or simply the

"Ordinance"). The Ordinance required the licensing of, and otherwise further regulated, certain "adult" businesses and individuals associated with them, and the original version thereof was enacted through the adoption of Bill No. O97-796 on August 19, 1997, which is found at App. 24-89.

On October 17, 1997, before individuals and businesses were required to file applications for licenses, Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc., The Pleasure Palace, Inc., Dawn Pierce, and Elizabeth Martz (the "*Deja Vu* Plaintiffs") filed suit in the United States District Court for the Middle District of Tennessee, Nashville Division, seeking to enjoin and declare unconstitutional Ch. 6.54. The *Deja Vu* Plaintiffs also filed a motion for preliminary injunction at that time.

On November 20, 1997, Jerry Pendergrass, the 822 Corporation, and the 421 Corporation (the "Pendergrass Plaintiffs"), filed a similar action in the same court, which was consolidated with the *Deja Vu* action.

The legal challenge brought by the *Deja Vu* Plaintiffs in their motion was limited to a claim that the Ordinance failed to contain the requisite procedural guarantees mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965). The *Deja Vu* Plaintiffs reserved all other legal challenges. The Pendergrass Plaintiffs joined in that motion but added a claim that the "civil disability" provisions of Ch. 6.54 – which precluded the licensing of individuals who had previously been convicted of certain enumerated crimes – were unconstitutional.

On December 1, 1997, a hearing was held on the preliminary injunction motions, after which the district

court entered an Order and Memorandum enjoining Ch. 6.54 in its entirety because of the lack of *Freedman* procedural guarantees. Pet. App. 180a-200a. The court declined to rule on the civil disability issue, finding it unnecessary in light of the *Freedman* ruling. Pet. App. 197a.

Metro then enacted *eighty-four* amendments to Ch. 6.54. App. 90-118. Based upon some of these changes and the adoption by the Tennessee legislature of a "judicial review" procedure statute (T.C.A. § 27-9-111(e), found at Pet. App. 272a-274a), Metro filed a motion to dissolve the preliminary injunction, contending that Ch. 6.54 was now constitutional. App. 242-245. Over the objections of the Plaintiffs, the district court lifted the preliminary injunction on December 3, 1998. Pet. App. 162a-179a. The Plaintiffs filed a Notice of Appeal challenging that ruling.

The Plaintiffs then filed second motions for injunctive and declaratory relief which, at the insistence of Defendant and pursuant to court order, included therein all of the other constitutional challenges that they desired to litigate by way of a preliminary injunction but which had been reserved (or not ruled upon) in the first motions. App. 2. In addition, pursuant to leave of court, Plaintiffs filed a motion for interim attorney fees predicated upon the entry of the first preliminary injunction and the subsequent developments. That motion was – and all later fee motions were – referred to the Federal Magistrate for consideration.

After the filing of Plaintiffs' second motions for preliminary injunction, but before the district court had an opportunity to adjudicate the issues set forth therein, Metro enacted *ninety-two* amendments to Ch. 6.54 in an